(21,261.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 199.

R. R. RICHARDSON, APPELLANT,

vs.

SANTIAGO AINSA, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF FRANK ELY, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 No. 1024.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. De Vess, and Wm. S. Fleming, Appellants,

vs.

SANTIAGO AINSA, Administrator with the Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

RECORD ON APPEAL.

2 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. De Vess, and Wm. S. Fleming, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

I, Richard E. Sloan, Associate Justice of the Supreme Court of the Territory of Arizona, do hereby certify that the above-entitled case was tried in said court upon an Agreed Statement of Facts, which statement of facts contains the original and amended complaint and the answer thereto, and which statement of facts was made and entered into by the attorneys for the appellant and appellee in said cause; that there was no further evidence introduced upon the trial of said cause in said court, and that the said cause was tried upon the said Agreed Statement of Facts; that by reason thereof, the said Agreed Statement of Facts is a full and complete statement of the case, and that a true copy of said Agreed Statement of Facts is hereto appended, as and for a statement of the case.

In witness whereof, I have hereto set my hand on this the 23d day of May, A. D., 1908.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

3 In the Supreme Court of the Territory of Arizona.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased,

vs.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. De Vess, and Wm. S. Fleming.

Agreed Statement of Case.

This is a suit to quiet title to a confirmed Mexican Land Grant, known and called the San Jose de Sonoita Grant.

This suit was originally commenced by complaint, filed in this Court by Frank Ely, on June 24th, 1887. This complaint was amended by consent on the 27th day of September, 1907. The original and Amended Complaint are as follows:

4 *Original Complaint.*

In the First Judicial District of the Territory of Arizona in and for the County of Pima.

FRANK ELY, Plaintiff,

vs.

THE NEW MEXICO AND ARIZONA RAILROAD COMPANY (a Corporation), Francis Day (Administrator of the Estate of John Day, Deceased), Robert V. Bloxton, Henry Brennick, Thomas Driscoll, Wm. De Vess, Wm. S. Fleming, Christian Foster, William Greene, Ada Kane (a Minor), Josephine Kane (a Minor), Sylvester M. Lancel, Edward Lambley, Jacob A. Linder, Timothy S. Lamberson, John Mansfield, Frederick Maish, R. R. Richardson, Geo. W. Stevens, D. A. Sanford, C. C. Watkins, Defendants.

5 Plaintiff complains of defendants and for cause of action alleges:

I.

That the New Mexico and Arizona Railroad Company, defendant herein, is, and for more than four years last past has been, a railroad corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and doing business in the said County of Pima.

II.

That in, or about, the — day of ——, 1878, John Day died intestate in the County of Pima, Arizona Territory; that thereafter, and on or about the 11th day of November, 1878, letters of administration upon the estate of the said John Day were issued by the Probate Court of said Pima County, to defendant, Francis Day; that immediately, thereupon, the said defendant, Francis Day, duly qualified and entered upon the duties of her said office and that said letters have not been revoked.

III.

6 That defendants, Ada Kane and Josephine Kane, are minors under the age of twenty-one years; that said minors are non-residents of this Territory, and have no guardian of their estates in this Territory.

IV.

That plaintiff is the owner in fee of all that certain piece or parcel of land granted by the Mexican authorities to Leon Herreras on the 15th day of May, 1825. Said grant is known as, and called, the Rancho San Jose de Sonoita and the land is situated in the

Sonoita Valley, in the County of Pima, Arizona Territory, about twenty-five miles southeast from the old town of Tubac, and some six miles northeast from the Calabasas Ranch, in a canyon formed by the slopes of the Santa Rita and the Patagonia Mountains. Said land is more particularly bounded and described as follows, according to the calls of the survey of said rancho as made by the Government of Spain on June 26 and 27, 1821, as appears from the expediente or patent to said tract of land, herewith filed and made part of this complaint:

Taking as a center the walls of the San Jose de Sonoita Mission, there were measured in a northeasterly direction sixty-three Spanish cords, which ended a little beyond a spring at the foot of some
7 low hills, a chain of mountains of a valley which goes on and turns to the east, where was placed a heap of stones as a monument.

From this monument there were measured, to the southeast twenty-five cords, which, going up the valley, ended on the left side of a chain of hills, and at the foot of one of them, whose slope was covered with oak trees, and on the top was placed a heap of stones as a monument; and on the opposite side were measured, also, twenty-five cords on a high white hill, covered with grass, distinguished by this reason from the others near it, which are part of the Santa Rita mountains, and on the top of which hill was placed a heap of stones as a monument.

Returning to the center, the cord was extended in the direction of the east, and there were measured twenty-five cords ending in a high mountain located on this side, on a somewhat high hill covered with many oak trees, where a heap of stones was put in sign of a monument.

Returning to the center, the cord was laid towards the west, and twenty-five cords were measured, ending on the main road to Tubac, on a little hill called the "Cazadero," on which was placed a heap of stones as a monument.

Returning to the center, the cord was extended towards
8 the south, all along down the canyon, by which there were measured and counted three hundred and twelve cords, that ended in the same canyon at the dropping down of a table land, on the main road, at a place called the "First Ford," with the direction looking towards the west, on account of the turn which the said canyon had made, and there was put a heap of stones as a monument, and as heads, or corners, there were measured on the right side twenty-five cords to the other side of a ledge that ends in high rolling boulders in a hill that forms a little valley, where I ordered to be placed a heap of stones as a monument. And on the left side there were measured by the surveyors twenty-five cords to the first of two little hills, almost exactly alike, one to the other, which are named "The Twins," which serves as a monument, as these are distinguished from all the other hills which surround them; and on the summit was placed a cross. This end of the survey, more or less, is about two leagues off from the Calabasas ranch, at the nearest place.

And, in view of the suggestion made by the claimant to reduce the number of cords actually measured, so much as might be calculated to be in fact in excess of the true measurement, by reason of the many turns of the canyon over which the survey was made, as it could not be carried on straight, twenty-five cords were
9 deducted out of the three hundred and twelve cords measured in the last survey down the canyon, the claimant consenting thereto, as just. The survey was calculated to be two hundred and eighty-seven cords, with which this survey was finished.

V.

That the above named defendants and each of them claim an estate or interest in and to said above described land and premises, adverse to this plaintiff; that the said claim of the said defendants and of each of them is without any right whatsoever, and the said defendants have not, nor have any, or either of them, any estate, right, title, or interest whatever in said lands or premises, or any part thereof.

Wherefore, plaintiff prays:

1st. That the said defendants, and each of them, be required to set forth the nature of his claim, and that all adverse claims of the defendants, and each of them, may be determined by a decree of this Court.

2d. That by said decree it be declared and adjudged that the defendants have no estate or interest whatever in or to said land and premises, or in or to any part thereof; and that the title of plaintiff is good and valid.

10 3d. That the defendants, and each of them, be forever enjoined and debarred from asserting any claim whatever in or to said lands and premises, or to any part thereof, adverse to the plaintiff; and for such other and further relief as to this Honorable Court shall seem meet and agreeable to equity, and for his costs of suit.

ROCHESTER FORD,
JEFFORDS & FRANKLIN,
Attorneys for Plaintiff.

11 *Amended Complaint.*

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Plaintiff,

vs.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. Watkins, Jacob A. Linder, Wm. De Vess, and Wm. S. Fleming, Defendants.

Now comes the above named plaintiff, and by leave of Court first had and obtained, files this as his amended complaint herein, and alleges:

I.

12 That on the 28th day of June, 1887, and for some time prior thereto, and continuously thereafter and until the day of his death, Frank Ely was the owner in fee of all that certain piece or parcel of land, then situate in the County of Pima in the Territory of Arizona, but now situate in the County of Santa Cruz in said Territory of Arizona, the said County of Santa Cruz having been by an Act of the Legislative Assembly of the Territory of Arizona, approved March 15th, 1899, created out of the said County of Pima, which said certain piece or parcel of land is known as and called the Rancho San Jose de Sonoita, being a Mexican grant, granted by the Mexican authorities to Leon Herreras on the 15th day of May, 1825, and being situate about twenty-five miles southeast from the old Town of Tubac and some six miles northeast from the Calabasas Ranch in a canyon formed by the slopes of the Santa Rita and the Patagonia Mountains.

II.

That on the 14th day of February, 1890, at the City of St. Louis, State of Missouri, said Frank Ely died seized and possessed of said piece or parcel of land aforesaid; That the said Frank Ely, in his lifetime, made and published his last will, whereby he appointed Clara D. Ely, Louis B. Ely and Robert C. Ely executors
13 thereof; that on the 24th day of February, 1890, at the said City of St. Louis, said will was proved and admitted to probate in the Probate Court of the said City of St. Louis in said State of Missouri; that thereafter and on the 23rd day of November, 1891, at Tucson, Arizona, the said Will was proved and admitted to probate in the Probate Court of Pima County, Arizona Territory; that, as the said executors named in said will were non-residents of the Territory of Arizona and were not qualified to act as executors in the Territory of Arizona, this plaintiff was, on the 23rd day of November, 1891, duly appointed by said Probate Court of Pima County the Administrator with will annexed of the estate of said Frank Ely, deceased; that thereupon and on the said 23rd day of November, 1891, this plaintiff duly qualified and entered upon the discharge of his duties as said Administrator, and that said letters of administration have not been revoked; and that on the said 23rd day of November, 1891, plaintiff was, ever since has been and now is the duly appointed and qualified administrator with will annexed of the estate of Frank Ely, deceased.

That on the 6th day of August, 1902, the United States Court of Private Land Claims, in a certain suit pending before it, wherein the United States of America was plaintiff and this plaintiff and the said R. R. Richardson, D. A. Sanford, Wm. S. Fleming
14 and C. C. Watkins were defendants, did render and enter its judgment and decree wherein it did adjudge and decree, amongst other things, that the said grant, aforesaid, of the said land and premises, aforesaid, to said Don Leon Herreras, aforesaid, did constitute a valid, complete and perfect title at said date, to-wit, the said 15th day of May, 1825, and that this plaintiff, as Administrator,

as aforesaid, had acquired an interest in said lands and premises, and wherein the said Court did make confirmation of said grant, in which said decree of confirmation, it did specially describe the boundaries of said land as hereinafter set out. That thereafter and in pursuance of said decree of confirmation, the United States of America, by the President did make and execute a deed or patent, confirming said grant to the said original grantee, his heirs, successors in interest and assigns, in which said patent said lands were specifically bounded and described as follows, to-wit:

That portion of the San Jose de Sonoita Private Land Claim, situate in township twenty-two south, ranges fourteen, fifteen and sixteen east of Gila and Salt River Meridian, in the County of Santa Cruz, Arizona, and along the Sonoita Creek and canyon, and contains an area of five thousand, one hundred and twenty-three acres and forty-two hundredths of an acre, according to the plat and
15 survey of said claim, approved by the Court of Private Land Claims April 12th, 1904, being more particularly bounded and described as follows, to-wit: Beginning at the old abandoned place of Sonoita, which was correctly designated as the point marked "initial mon." on the map of the San Jose de Sonoita Private Land Claim, surveyed and drawn by George J. Roskruge, County Surveyor, June, 1889, and filed in this cause March 20th, 1894, as defendant's Exhibit 1; from which central initial monument run north 52 degrees east, 63 cords or eight thousand six hundred and ninety and eighty-five hundredths (8690.85) feet to the northeast center monument; from said northeast center monument run south 60 degrees east 25 cords, or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the southeast monument, and from said northeast center monument run north 56 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the northeast monument; returning to the central initial monument run south 79 degrees east, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the east center monument, and from said initial monument run also north 75 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the west center monument, from
16 said east center monument run south 70 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the southwest monument, and from said west center monument run south 72 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the northwest monument and connect the northwest and southwest monuments by a straight line.

Plaintiff avers that the land-, so confirmed by the United States Court of Private Land Claims, and for which the United States Patent was issued, as aforesaid, were a part of the lands contained within the Rancho San Jose de Sonoita, aforesaid, and were included within the limits of the said Rancho San Jose de Sonoita, as bounded and described in the first complaint filed in this action.

III.

That plaintiff is the owner in fee of all that part of the said Rancho San Jose de Sonoita, so confirmed by the United States Court of Private Land Claims, as aforesaid, and so granted and conveyed by the United States patent, aforesaid, and described as follows:

17 All that part or portion of the San Jose de Sonoita Private Land Claim, situate in township twenty-two south, ranges fourteen, fifteen and sixteen east of Gila and Salt River Meridian, in the County of Santa Cruz, Arizona, and along the Sonoita Creek and Canyon, and contains an area of five thousand one hundred and twenty-three acres and forty-two hundredths of an acre, according to the plat and survey of said claim, approved by the Court of Private Land Claims April 12th, 1904, being more particularly bounded and described as follows, to-wit: Beginning at the old abandoned place of Sonoita, which was correctly designated as the point marked "initial mon." on the map of San Jose de Sonoita Private Land Claim, surveyed and drawn by George J. Roskruge, County Surveyor, June, 1889, and filed in said Court of Private Land Claims, March 20th, 1894, as defendant's Exhibit 1; from which central initial monument run north 52 degrees east; 63 cords or eight thousand, six hundred and ninety and eighty-five hundredths (8690.65) feet to the northeast center monument; from said northeast center monument run south 60 degrees — 25 cords, or three thousand, four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the southeast monument, and from said northeast center monument run north 56 degrees west, 25 cords or three thousand,

18 four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the northeast monument; returning to the central initial monument run south 79 degrees east, 25 cords or three thousand, four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the east center monument, and from said central initial monument run also north 75 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the west center monument, from said east center monument run south 70 degrees west, 287 cords or thirty-nine thousand, five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the southwest monument, and from said west center monument run south 72 degrees west, 287 cords or thirty-nine thousand, five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the northwest monument and connect the northwest and southwest monuments by a straight line.

That plaintiff is credibly informed and believes that the defendants and each of them make some claim to the said above described lands and premises adverse to this plaintiff; that the said claim of said defendants and of each of them is without any right whatsoever, and that said defendants have not nor have any or either of them any estate, right, title or interest whatsoever to the said above described lands and premises or any part thereof.

19 Wherefore, Plaintiff prays for the establishment of his estate and that the defendants and each of them be barred and forever estopped from having or claiming any right or title to

the said premises adverse to plaintiff and that said defendants and each of them be adjudged and decreed to have no estate or interest whatsoever in or to said lands or premises or to any part thereof, and that the title of plaintiff is good and valid, and that plaintiff do have such other and further relief as to this Honorable Court shall seem meet and agreeable to equity and for his costs of suit.

SELIM M. FRANKLIN,
Attorney for Plaintiff.

TERRITORY OF ARIZONA,
County of Pima, ss:

Selim M. Franklin, being first duly sworn, upon his oath, says that he is the attorney for the plaintiff in the above entitled action. That he has read the foregoing Amended Complaint and knows the contents thereof. That the facts therein stated are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes — to be true, and that all allegations and statements therein contained are true
20 in substance and in fact. That the reason he makes this affidavit is that the plaintiff is at present absent from the Territory of Arizona.

SELIM M. FRANKLIN.

Subscribed and sworn to before this 24th day of September, 1907. My commission expires April 25th, 1911.

[SEAL.] BESSIE McINERNAY,
Notary Public.

A demurrer to the original complaint was sustained. Plaintiff appealed to the Supreme Court of Arizona, which affirmed the judgment of the lower Court (2 Ariz., P. 420).

Plaintiff appealed from this judgment to the Supreme Court of the United States, which reversed the judgment of the Territorial Court and remanded the case. (Ely vs. N. M. A. R. R. Co., 129 U. S., p. 29 1–4.

Thereafter the case was tried by the District Court on the merits and on June 6th, 1893, it rendered its judgment dismissing the complaint on the grounds that it had no jurisdiction. From this
21 judgment plaintiff appealed to the Supreme Court of Arizona. Ely, in the meantime, had died, and Ainsa, his administrator, was substituted as plaintiff. The Supreme Court of Arizona affirmed this judgment of the lower Court. (36 Pac. p. 213), and plaintiff appealed to the Supreme Court of the United States. That Court reversed the judgment of the territorial Courts, and sent the same back for trial, holding that the District Court had jurisdiction, (175 U. S., p. 44), and at the April term, 1907, the case was again tried before the District Court.

The answer of the defendant, Richardson, to the said original complaint, and which was stipulated at the trial should be construed as answering said amended complaint, is as follows:

22 *Answer of R. R. Richardson.*

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Plaintiff,

vs.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. Watkins, Jacob A. Linder, Wm. De Vess, and Wm. S. Fleming, Defendants.

And now comes the defendant, R. R. Richardson and, by way of amended answer to plaintiff's complaint herein, states:

That he denies each and every of the material allegations in plaintiff's complaint cont-ined.

23 Denies that the plaintiff is the owner in fee or at all of the lands described in the complaint or any part thereof.

Denies upon information and belief that the Mexican authorities granted the land described in the plaintiff's complaint or any part thereof to Leon Herreras on the 15th day of May, 1825, or at any time or at all, or that any of them were surveyed by the Government of Spain at the time mentioned in the complaint or at any time or at all. Defendant alleges that he is the lawful owner in fee and entitled to the possession of the following described lands, viz:

The S. ½ of S. W. ¼ of Sec. 12 and N. ½ of N. W. ¼ of Sec. 13, township 22 S., of range 15 E.

Fractional lots 1 and 2, the N. E. ¼ of N. W. ¼, and fractional ¼ of N. W. ¼ of section 7, township 22 S., range 16 E.

The S. ½ of N. E. ¼ and N. ½ of S. E. ¼ of Sec. 14, township 22 S., range 15 E.

The E. ½ of S. W. ¼ and W. ½ of S. E. ¼ of Sec. 14 and N. E. ¼ of N. W. ¼ of section 23, in township 22 S., range 15 E.

24 Also 160 acres of land commonly known as the Ashburn place and situate between the Fields ranch and the Jim Ashburn Ranch; that said claim and ownership is adverse to the plaintiff and to all the world, and he denies that his said claim to said lands is without right or that he had not any estate, right, title or interest in the lands above described, and denies that the lands so owned and held by him aforesaid are within the tract of land described in the complaint or that the same forms any part of plaintiff's said tract, and denies that plaintiff is the owner in fee or otherwise of the lands hereinabove described as the property of this defendant, or of any part thereof.

II.

And for a second defense to the matters alleged in the plaintiff's complaint herein and his action thereon, this defendant alleges:

That he is the owner in fee and entitled to the possession of the following described lands:

The S. E. ¼ of the S. W. ¼ of Sec. 12 and the N. ½ of the N. W. ¼ of Sec. 13, in township 22 S. of range 15 E.

Fractional lots 1 and 2, the N. E. ¼ of the N. W. ¼ and fractional S. E. ¼ of N. W. ¼ of Sec. 7, township 22 S. of range 16 E.

25 The S. ½ of the N. E. ¼ and the N. ½ of the S. E. ¼ of Sec. 14, township 22 S. of range 15 E.

The E. ½ of S. W. ¼ and the S. W. ¼ of the S. E. ¼ of Sec. 14 and N. E. ¼ of N. W. ¼ of Sec. 23, in township 22 S., range 15 E.

Also 160 acres of land commonly known as the Ashburn place and situate between the Fields ranch and the Jim Ashburn ranch.

And he avers that he and his grantors under whom he claims have been in the peaceable, exclusive, continuous, open, notorious possession of the lands hereinabove described for husbandry, pasturage, and the ordinary uses of the occupant, claiming title thereto under the United States and adversely to the plaintiff and all other persons, for more than five years next before the commencement of this action.

And he further avers that neither the said plaintiff nor any person or persons under whom he claims, whether as ancestor, predecessor, or grantor, was, were, or have been seized or possessed of the premises described in the complaint, nor of the premises in this amended answer above described within five years before the commencement of the act in respect to which this action is prosecuted nor

26 within five years before the commencement of this action, and during the whole of the time aforesaid this defendant, his predecessors in interest and grantors, have paid taxes thereon.

III.

And for a third defense this defendant alleges that the premises described in the complaint and known and called the "Rancho San Jose de Sonoita" are claimed by the plaintiff under a pretended grant alleged to have been made by the Mexican authorities of Leon Herreras on May 25, 1825; but defendant alleges that said pretended grant was upon the condition that he should occupy and cultivate said land to the utmost of his ability without allowing it to be abandoned for any time, with the understanding that if ever it should be totally abandoned for one entire year and there should be any person asking to settle on it, in such event, previous notice being given, it might be sold to the highest bidder.

That said premises were afterwards abandoned by the said Leon Herreras and remained totally abandoned by the said Leon Herreras and those claiming under him for a long period of time, to-wit: from the year 1831 until the present time.

That while the premises were so abandoned all the interest of the Republic of Mexico therein became vested in the United

27 States of America by virtue of the treaty between the two nations, commonly called the Gads-en treaty, ratified and published in the year 1854.

That afterwards and while the premises were so abandoned as

aforesaid and wholly unoccupied by the said Herreras or anyone claiming under him the United States entered thereon, and extended the Government surveys over the same, and offered the same for sale in accordance with the laws thereof governing the occupation and sale of public lands thereof, and in accordance with said laws on or about the — day of ——, sold a part thereof, to-wit:

The S. ½ of the S. W. ¼ of Sec. 12 and N. ½ of the N. W. ¼ of Sec. 13, in township 22 S., range 15 E.

Fractional lots 1 and 2, the N. E. ¼ of N. W. ¼ and fractional S. E. ¼ of N. W. ¼ of section 7, in township 22 S., range 16 E.

The S. ½ of N. E. — and N. ½ of S. E. ¼ of Sec. 14, township 22 S., range 15 E.

The E. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼ of Sec. 14 and N. E. ¼ of N. W. ¼ of Sec. 23, in township 22 S., range 15 E.

28 Also 160 acres of land commonly known as the Ashburn place and situate between the Fields ranch and Jim Ashburn ranch.

And afterwards, on the — day of ——, the United States of America conveyed the same by patent to —— and which last-described lands and the title thereto have become vested in this defendant by good and sufficient conveyances from the said patentee, and this defendant and his grantors have been in the open, notorious, exclusive and adverse possession thereof, claiming title thereto under the United States against all the world, for more than five years next prior to the commencement of this action, and during said time have paid the taxes thereon, and defendant avers that plaintiff is barred of his said action against this defendant by virtue of the provisions of Chapter 35, Compiled Laws of Arizona, in force at the commencement of this action.

And defendant further alleges that he does not now claim nor has he ever claimed any estate or interest in or to any other part or portion of the lands described in the complaint.

IV.

29 And for a fourth defense this defendant alleges that the cause of action of the plaintiff, if he has any, accrued more than — years next before the commencement of this action.

V.

And for a fifth defense this defendant alleges that the cause of action of the plaintiff, if he has any, against this defendant accrued more than five years next before the commencement of this action.

Wherefor- this defendant prays to be hence dismissed, and that he recover of the plaintiff his costs herein.

BARNES & MARTIN,
Attorneys for R. R. Richardson.

Endorsed: Filed Dec. 24, 1892, at 9:45 o'clock A. M. Brewster Cameron, clerk.

It is admitted that on May 15th, 1825, the Mexican Government granted the lands in question to Leon Herreras by Letters Patent, a copy of which was introduced in evidence on the trial. At the time the present suit was brought, these lands were situated in Pima County, Arizona. Subsequently the County of Santa Cruz
30 was created by Act of the Legislative Assembly of Arizona, and the lands are now situated in that County, but counsel have elected to try the case in Pima County. The grant is situated in that portion of Arizona, which was acquired by the United States under the Gadsden Purchase, and was a complete and perfect grant at the time of such treaty.

On December 30th, 1879, Matias Alsua, who at that time claimed to own the grant, and who is a grantor of plaintiff, filed his request with the Surveyor General of Arizona, to examine and report upon the grant. The officers of the Government of the United States did execute Homestead Patents to Wm. Morgan and Cornelius Ryan, for certain of the land within the limits of the said Sonoita Grant, as follows:

On the 13th day of December, 1879, a patent was issued by the President of the United States of America to Wm. Morgan for the S. ½ of the S. W. ¼ of Sec. 12, and the N. ½ of the N. W. ¼ of Sec. 13, in Tp. 22 S. of R. 15 E., under the United States Public Land Laws relative to homestead entries, the said Morgan having patented said land under the United States Homestead Laws, and having made final proof thereon. On the first day of September, 1880, a patent was issued by the President of the United
31 State of America to Cornelius Ryan for the S. ½ of the N. E. ¼ and the N. ½ of the S. E. ¼ of Sec. 14, Tp. 22 S. of R. 15 E., under the United States public land laws relative to homestead entries, the said Ryan having patented said land under the United States Homestead Laws, and having made final proof thereon.

On the date that this suit was filed, to-wit: on June 24th, 1887, the defendant, R. R. Richardson, was the owner, under mesne conveyances from said Morgan and said Ryan of their rights, titles and interests in the above described lands. From date of said patents, to-wit: December 13th, 1879, on the Morgan land, and Sept. 1, 1889, on the Ryan land, up to the date of the commencement of this action on June 1st, 1887, the said Morgan and Ryan and their grantees, and the said R. R. Richardson, and his grantors, were in the constant, open and adverse possession of the said two pieces of land, paying taxes thereon.

At the time of Ely's death he was the owner of said grant through mesne conveyances from the original owner, Ainsa, Administrator, from the time of his appointment as Administrator and at the time of the trial was the owner in fee of said grant, as confirmed
32 by the U. S. Court of Private Land Claims, subject, however, to whatever limitations or exceptions were imposed thereon by law.

A patent was signed by the President of the United States for the grant on October 9th, 1906, said patent being in words and figures as follows:

The United States of America, to all to whom these presents shall come, Greeting:

Whereas, in accordance with the provisions of the Act of Congress, approved the third day of March, one thousand eight hundred and ninety-one, entitled: "An Act to Establish a Court of Private Land Claims and to provide for the settlement of private land claims in certain States and Territories," the claim of Don Leon Herreras, and his heirs, successors in interest and assigns, in and to that portion of the San José de Sonoita Private Land Claim, situated in township twenty-two south, ranges fourteen, fifteen and sixteen east of Gila and Salt River Meridian in the County of Santa Cruz, Arizona, and along the Sonoita Creek and Canyon, and contains an area of five thousand one hundred and twenty-three acres and forty-two hundredths of an acre, according to the plat and survey of said claim, approved by the Court of Private Land Claims, April 12th,
33 1904, being more particularly bounded and described as follows, to-wit: Beginning at the old abandoned place of Sonoita, which was correctly designated as the point marked "initial mon" on the map of the San Jose de Sonoita Private Land Claim, surveyed and drawn by George J. Roskruge, County Surveyor, June, 1889, and filed in this cause March 20th, 1894, as defendant's Exhibit 1; from which central initial monument run north 52 degrees east, 63 cords or eight thousand six hundred and ninety and eighty-five hundredths (8690.85) feet to the northeast center monument run south 60 degrees east, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3488.74) feet to the southeast monument, and from said northeast center monument run north 56 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the northeast monument; returning to the central initial monument run south 79 degrees east, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the east center monument, and from said central initial monument run also north 75 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the west center monument; from said east center monument run south
34 70 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the southwest monument, and from said west center monument run south 72 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the northwest monuments and connect the northwest and southwest monuments by a straight line.

Now, Know Ye, That the United States of America, in consideration of the premises, and in conformity with the aforesaid Act, have given and granted and by these presents do give and grant unto the said Don Leon Herreras and to his heirs, successors in interest and assigns the tract above described: To Have and to Hold the same together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging unto the said Don Leon Herreras, and to his heirs, successors in interest and assigns forever.

Provided, That this grant shall not confer any right or title to any gold, silver, or quicksilver mines or minerals of the same; but all such mines and minerals shall remain the property of the United States, with the right of working the same; and that the said grant is made subject to all the limitations and terms of the said Act of Congress of March 3, 1891.

35 In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-ninth day of October, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and Thirty-first.

[SEAL.]

By the President,

T. ROOSEVELT.

By F. M. McKEAN, *Secretary.*

C. H. BUSH,
Recorder of the General Land Office.

Rec. Misc. Vol. 577, pages 470 to 473.

The suit before the Court of Private Land Claims, involving the validity of said grant, was instituted by the United States, under the third paragraph of Section eight of the Act, creating the Court of Private Land Claims, and was not commenced by Santiago Ainsa, Administrator, the claimant of the grant. The pleadings in said case, and the decree of said Court of Private Land Claims,

36 and its order approving the survey of the grant, as confirmed, are as follows:

Petition of Government.

UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Sante Fe District, September, A. D. 1892.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator of the Estate of Frank Ely, Deceased; Rollin R. Richardson, Don A. Sanford, Wm. S. Fleming, C. C. Watkins, Defendants.

San Jose De Sonoita Claim.

To the Chief Justice, and Associate Justices of the Court of Private Land Claims, sitting at Santa Fe, New Mexico:

37 Comes now the United States by its attorney, under the direction and order of the Attorney General of the United

States, the Head of the Department of Justice, and presents this petition and informing the Court, says:

That he is informed and believes and so charges that Santiago Ainsa, Administrator of the Estate of Frank Ely, deceased, who resides at the City of Tucson, Arizona, claims to be the owner through mesne conveyances, of a large tract of land in the Territory of Arizona, known and called the "Rancho de San Jose de Sonoita" about fourteen miles long and about two miles wide, by virtue of a grant made on or about the — day of —— to his intestates grantors, by officers of the Republic of Mexico, authorized by the laws and usages of that Republic, so to do at a time when said lands were a part of said Republic, and afterwards ceded to the United States by what is known as the "Gadsden Purchase" of lands from said Republic by the United States.

He claims that by said Grant he acquired a fee-simple title to the land so granted, and that his title was complete and perfect at the date when the United States acquired sovereignty over the same.

That he has not voluntarily come into said Court under the
38 provisions of "An Act to Establish a Court of Private Land Claims, and Provide for the settlement of Private Land Claims in certain States and Territories," for a consideration of such title according to the provisions of said Act.

He says that neither Ainsa or his intestate or any grantor from whom they derive title have ever been in the possession of or have occupied the lands so claimed by them, and they do not now.

That the lands claimed by them as aforesaid, are not now or have they ever been designated by occupation or segregated from other lands, by marks on the ground, by fence, monument or other means of designation. That the boundaries of the land claimed are uncertain and indefinite.

That as their location and extent are uncertain, a more certain description of the lands claimed by said Ainsa as aforesaid cannot be alleged or set out here.

He says that the title to the lands so claimed by said Ainsa, Administrator aforesaid, by virtue of such grant is open to question, and he says that the grant is invalid and void, if any he has, purporting to so grant and convey lands as aforesaid to said intestate grantors, because the same was not made according to law
39 then in force, or by officers and persons authorized by law to alienate, sell or convey the public lands in the then Republic of Mexico.

He says that at the date the United States acquired sovereignty over the territory which embraces said lands, said lands so claimed were not located, nor were the title papers upon which the said claim was then based, recorded in the archives of Mexico.

He says that a portion of the lands so claimed as aforesaid were many years ago surveyed by the proper officers of the United States, and opened for settlement and entry by citizens of the United States, and thereupon divers persons under and by virtue of said laws entered upon said lands and reclaimed the same by building houses and fences, and constructing irrigating ditches, and have themselves

or by their grantors continued in the peaceable enjoyment and possession of the same ever since, and having complied with the land laws, patents were issued to such persons by the United States and the land- were, and ever since have been so occupied, possessed and enjoyed by persons holding under said patents.

That Rollin R. Richardson now holds and occupies the north half of the northeast quarter of Section 13, and the south half of
40 the southeast quarter of Section 12 in Township No. 22 South of Range 12 East of the Gila and Salt River base line and meridian, having by several mesne conveyances acquired the title to the same from persons holding patents from the United States.

And he says that C. C. Watkins so holds and occupies the southeast quarter of Section 8 in said township 22; and he says that Don A. Sanford so holds and occupies the northeast quarter of Section 30; south one-half of southwest quarter and south one-half of southeast quarter of Section 20 and southeast quarter of Section 21, and northwest quarter of northeast quarter and northeast quarter of northwest quarter of Section 28; the south one-half and northwest quarter of southeast quarter of Section 21; N. W. ¼ of S. W. ¼ of Section 22; N. W. ¼ of N. E. ¼ of Section 22; S. ½ of S. E. ¼ of Section 15; S. W. ¼ of S. W. ¼ of Section 14; S. ½ of S. E. ¼ Section 6 S. W. ¼ of Section 5, all in said Township 22.

And the said Wm. S. Fleming so holds and occupies the N. E. ¼ of Section 7 and the S. E. ¼ of Section 6 Township 22 South Range 15 aforesaid.

That all of said lands so patented by the United States are within the said claimed limits of the lands claimed by said Ainsa, Administrator as aforesaid.

41 He therefore prays that the Court may order and direct such notice as to the Court may seem reasonable and proper be given to defendants of this petition.

And that defendant Ainsa, Administrator as aforesaid, be ruled to answer this petition and that he be particularly ruled to produce the title papers upon which he has based his claim to lands called the Rancho de San Jose de Sonoita and to file a copy of the same with his answer hereto, and that he also be required to produce and file a map of the lands claimed by him.

And that defendants Richardson, Fleming, Watkins and Sanford be ruled to answer this petition also, and disclose to the Court their muniments of title.

That the title to said lands be settled and adjudicated, and if the title be adjudged to be valid, that the extent and boundaries thereof be then settled and adjudicated, excepting any part of such land that shall be found to have been disposed of by the United States.

If the title to said lands be found to be invalid and void to so order, adjudge and decree.

And for such other order or orders, judgments or decree
42 as to the Court may seem meet and proper in the premises.

MATT G. REYNOLDS,
U. S. Att'y.

W. H. BARNES,
Of Counsel.

Filed in my office this 19th day of October, A. D. 1892.
JAMES H. REEDER, *Clerk,*
By IRENO L. CHAVES, *Deputy.*

Answer of Ainsa, Administrator.

In the United States Court of Private Land Claims.

UNITED STATES OF AMERICA,
District of New Mexico:

UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator of the Estate of Frank Ely, Deceased; Rollin R. Richardson, Don A. Sanford, Wm. S. Fleming, C. C. Watkins, Defendants.

43 Comes now Santiago Ainsa as Administrator with the will annexed of Frank Ely, deceased, by his attorney, and for his separate answer to the petition of the United States of America herein admits that as such administrator he is holding and asserting a claim in fee by a complete and perfect title to the land in Pima County, Territory of Arizona, known as the San Jose de Sonoita Private Land Claim or Grant, as set out in said petition, and admits that he has not voluntarily come into this Court for a consideration of such title.

Defendant denies that neither he nor his intestate nor any grantor from whom they derived title, have never been in the possession of, nor have occupied the land so claimed by them, and that they do not now.

Defendant denies that the land- claimed by them as aforesaid are not now or that they have not been designated by occupation or segregated from other lands by marks on the ground, by fence, monuments or other means of designation, and denies that the boundaries of the land claimed are open to question, and that the location, extent and boundaries of the lands claimed are uncertain and indefinite.

Defendant denies that the title to the lands so claimed by him, as administrator, by virtue of the grant under which they are
44 sold and conveyed, is open to question, and denies that the said grant is invalid and void, because the same was not made according to the law then in force or that it is invalid and void for any other reason or at all.

Defendant denies that at the date the United States acquired sovereignty over the Territory which embraces said land, said land so claimed was not located, and denies that the title papers upon which the said claim was then based were not recorded in the archives of Mexico.

Defendant avers that whether patents were issued to any or all of the persons named in the petition herein, as set out therein, he has no information on which to form a belief, and he therefore

denies the same, but defendant avers that any and all of said patents, if any were issued, were and are wholly invalid and void as to this defendant.

Defendant avers that the title papers to the said private land claim or grant are now in the possession of the United States Surveyor-General for the Territory of Arizona; that the defendant has requested the delivery to him of such title papers but that the said United States Surveyor-General has refused so to do, and that
45 for this reason this defendant is unable to file with this answer the said title papers.

ROCHESTER FORD,
Attorney for Defendant.
SANTIAGO AINSA,
Administrator, &c.

Filed in my office this 25th day of November, A. D. 1892.
JAMES H. REEDER, *Clerk,*
By IRENO L. CHAVES, *Deputy.*

In the Court of Private Land Claims, Arizona District.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator of the Estate of Frank Ely, Deceased, et al., Defendants.

46 *Amended Answer.*

Comes now Santiago Ainsa, Administrator with the will annexed of Frank Ely, deceased, and by leave of Court first had and obtained filed this his amended answer, and in addition to the allegations already set forth in his answer on file herein, alleges, as follows:

That, as such administrator, he is the owner in fee, holder and possessor of that certain tract of land commonly known as the San Jose de Sonoita grant or private land claim, lying, being and situate in the southern part of the County of Pima, Territory of Arizona, and more particularly hereinafter described.

That defendant owns in fee, holds and possesses such lands under and by virtue of a certain instrument in writing, now and hereafter designated as and being a grant title, bearing date May 15, 1825, made and executed by Juan Miguel Reisgo, Commissary General of the Treasury, public credit and war, of the State of the Occident in the name of the Sovereign Nation of the Mexican Republic, under and by virtue of Article 8, of the royal ordinances of intendentes, of December 4, 1786, and pursuant to the provisions of the Royal
47 Institute of October 15th, 1754, which is quoted in the same article, and under and by virtue of the other laws governing said action.

That under and by virtue of such laws such proceedings were thereunder lawfully and regularly had as that the said Commissary General of the Treasury, public credit and war, of the State of the

Occident, in the name of the Sovereign Nation of the Mexican Republic duly and regularly and for a good and valuable consideration, to-wit: the sum of one hundred and sixteen dollars, two reales and five grains, and for other good and valuable considerations in said title set forth and described, did, on said May 15, 1825, sell and convey in fee to one Don Leon Herreras, the land hereinbefore mentioned and more particularly hereinafter described, commonly known as and called the San Jose de Sonoita grant or private land claim.

That the said grant or private land claim was instituted by a petition of said Don Leon Herreras to Brigadier General Cordero, Governor and Intendente of the provinces of Sonora and Sinaloa, praying for two sitios of land, more or less, in a place known as Sonoita in the jurisdiction of the presidio of Tubac, and that proceedings of survey, valuation and publication were taken on this petition as required by law and as set out in the said title papers, and on
48 May 15th, 1825, the tract as surveyed according to the said title papers, and the whole of said tract according to the natural land marks and boundaries set out in said proceedings of survey, was sold to said Don Leon Herreras for the sum of one hundred and sixteen dollars, two reales, and five grains, which amount was thereupon paid by said grantee; and that thereupon on said May 15, 1825, there was issued to the grantee the testimonio or titulo of said grant, and the said grant was thereupon on said 1st named date duly recorded in the archives of Mexico, to-wit, on page 2 of the proper book in the office of the said Commissary General.

Defendant alleges that said original grant title or instrument of writing by which said grant was conveyed to the aforesaid grantee is not in the possession or under the control of this defendant, but is, together with other records and papers relating to said grant, in the possession and custody of the United States Surveyor General of the Territory of Arizona at the City of Tucson. That for this reason the said original titulo or grant title constituting and creating said grant cannot be herewith presented or delivered, but defendant files herewith as exhibits to or parts of this answer three certified copies in Spanish of said original titulo and three copies of the translation of the same, and defendant avers that said copies are
49 correct and literal copies of said titulo and that said translations are correct translations of the same.

Defendant avers that the map filed herewith executed by George J. Roskruge, Esq., which map is made an exhibit to or part of this answer is a correct map of said San Jose de Sonoita grant or private land claim, and correctly represents the boundaries of said grant and the lands embraced therein, and defendant avers that he owns in fee by virtue of said grant title to all of said lands so designated by said map, and that the said grant comprises 12,147.69 acres, as shown by said map.

That under the provisions of the eighth section of the Act of Congress, approved July 22, 1854, entitled "An Act to Establish the Offices of Surveyor General of New Mexico, Kansas and Nebraska and to Grant Donations to Actual Settlers Therein," and for other

purposes, and under acts amendatory or in extension thereof, or supplemental thereto, one Matias Alsua, who was then the grantee of and successor in interest to Leon Herreras, the original grantee, of said grant, and who is the grantor of defendant, filed, on December 30, 1879, in the office of the United States Surveyor General of the Territory of Arizona his petition praying for the confirma-
50 tion to him of said San Jose de Sonoita grant, accompanying which petition were the original title papers of said grant; that thereupon the said United States Surveyor General caused said grant to be investigated by one R. C. Hopkins, a duly authorized and competent agent of the United States, and the said United States Surveyor General, in his official report under date of January 14, 1880, to Congress, on said grant, stated that said special agent Hopkins reported that the expediente of said grant had been found in its proper place in the archives of Mexico; that said expediente was written on the corresponding stamped paper; that the proceedings of survey, valuation, publication, and sale were all regular; that the signatures to the title papers were genuine, and that there was nothing to cast suspicion on the bona fide character of the original title papers; and said United States Surveyor General reported the said grant as a valid one, and recommended its confirmation to the extent of one and three-quarter square leagues, as measured by the original grantee, and no more.

Defendant avers that the statements in said report as to the genuineness of said grant and its record in the archives of Mexico are true, and that the said grant is in all respects a genuine and valid and lawful one, and that the said grant is and at the time of
51 the execution of the treaty known as the "Gadsden Treaty" was, duly recorded in the archives of Mexico.

Defendant avers that he owns, holds and possesses said grant under and by virtue of divers and sundry mesne conveyances made by the original grantee of said grant and his grantees to defendant which conveyences are in part on file in the office of the United States Surveyor General of the Territory of Arizona, and of record in the office of the County Recorder of the County of Pima, Territory of Arizona, and in part on file and on deposit in the office of the Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima; all of which conveyances this defendant will produce at the trial of this cause if he is able to secure same, and if not, he will produce and file in this Court certified copies of the same; and defendant herewith files as an exhibit to or part of this answer an abstract of all such conveyances under which he deraigns title to said grant.

Defendant further alleges that the original grantee of said grant was a Mexican and a citizen of the Republic of Mexico, and that at the time of the Gads-en Treaty the owners of said grant were likewise Mexicans and citizens of the Republic of Mexico.

Defendant avers that each and every person stated in the
52 petition filed herein by the United States to be in possession of any part of said grant is in possession unlawfully and without the permission of this defendant, and that any and all patents or other indicia or muniments of title issued by the United States

to any lands within the limits of said grant were issued in contravention of law and are wholly null and void so far as the rights of this defendant are concerned, for the reason that said grant is and at the time of the Gadsden Purchase was a complete and perfect titie in fee in the owners thereof; that the United States never had any title to any part of said grant, and that none of the said patents or muniments of title conveyed any title.

Defendant further avers that all of the steps and proceedings in the matter of the grant and sale of said lands were regular, complete and lawful, and vested a perfect and valid title in fee thereto in the grantee of said grant, and that said grantee at the time went into the actual possession, use and occupation of said grant, and erected the proper monuments thereon, and that said grantee and descendants and legal representatives have continued ever since and until the present time in the actual possession, use and occupation of the same, and are now seized and possessed in fee thereof; that said grant documents constitute a complete and definite grant in
53 fee by way of sale coupled with the condition subsequent not to abandon the same for a longer period than three years, without good reason, which would subject the tract to adjudication to third parties who might apply for or denounce the same; that no forfeiture of said grant was ever claimed, and that this defendant is entitled to a confirmation of said grant in accordance with the metes and bounds and natural land marks established by the said survey thereof made by the Spanish officials prior to the issuance of same, and that it vested in the grantee a perfect and valid title in fee to the whole of said tract, so surveyed.

Wherefore, defendant prays that the validity of his said title may be inquired into and decided, and that his title to said lands be declared valid, and that the said grant be adjudged to be and always to have been complete and perfect and unconditional title in fee, and that defendant be adjudged to be the owner in fee thereof, and for such other and further relief as to the Court may seem meet and proper in the premises.

ROCHESTER FORD,
Attorney for Defendant.
AINSA, *Administrator, etc.*

54 Filed in the office of the Clerk, Court of Private Land Claims, Mar. 20, 1894.

JAS. H. REEDER, *Clerk,*
By R. L. DE LONG, *Deputy.*

No. 40, San Jose de Sonoita Claim.

UNITED STATES, Plaintiff,
vs.
SANTIAGO AINSA et al., Defendants.

Reply.

Comes now the United States and for reply to the answer filed by the defendants herein says, that as to the matters and things therein

stated, which are not admissions of the allegations in the Petition, the same are denied and it is prayed that defendants be put to their proof as to the truth of the same.

And failing therein, that their prayer for affirmative relief by way of confirmation of said claim be denied and the claim be dismissed

MATT G. REYNOLDS,
U. S. Attorney.

W. H. BARNES,
Of Counsel.

55 Filed in the office of the Clerk, Court of Private Land Claims, March 20th, 1894.

JAS. H. REEDER, *Clerk.*

In the United States Court of Private Land Claims.

Case Number Forty, San Jose de Sonoita Grant.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Administrator of the Estate of Frank Ely, Deceased; Rollin R. Richardson, Don A. Sanford, William S. Fleming, C. C. Watkins, Defendants.

Decree of Confirmation.

This cause coming on at this time on the motion of defendant, Santiago Ainsa, Administrator of the Estate of Frank Ely,
56 deceased, to set aside the decree heretofore, to-wit, on May 16, 1902, entered in this cause and said motion being fully submitted to the Court, the same is sustained; and the cause being now fully submitted to the Court, it is ordered that the following judgment and decree be entered in conformity with the mandate of the Supreme Court of the United States filed in this Court on January 17, 1899.

I.

That a grant was made on the 15th day of May, 1825, by Juan Miguel Riesgo, Commissary General as interim of the Treasury, public credit and war of the Sovereign State of the Occident of the Mexican Republic, and in its name, to Don Leon Herreras of a tract of land known as the Rancho San Jose de Sonoita, situated within the jurisdiction of the Presidio of Tubac and more particularly hereinafter described.

II.

That the said grant was an auction sale of the said tract made by the Senor Intendente ad interim of the Province of Sonora and Sinaloa to the said grantee for the sum of one hundred and five dollars ($105) which sum was paid therefor by the said grantee unto the provincial ministers of the National Treasury of the Mexican Republic.

57

III.

That said sale and grant were so made and in pursuance of that certain law generally known as Article 81 of the Ordinances of intendentes of the 4th of December, 1786, and that other certain law known as the instruction of the 15th of October, 1754, and of the law of the Mexican Republic of September 21, 1824, and of the declaration known as the plan of Iguala, February 24, 1821, and of the law of the provincial council of the Mexican Empire of October 5, 1821, and of the law of said council of January 16, 1822, and of the law of said Council of February 2, 1822, all of which are hereby referred to as being those under which this decree is made, and reference is also hereby made to that certain treaty made between the United States and the Republic of Mexico on the 30th day of December, 1852, under which, as well as said laws before referred to, this decree is made.

IV.

That at the trial of this cause the answer of defendant Santiago Ainsa, Administrator of the estate of Frank Ely, deceased, was sustained by legal and satisfactory proofs, and it was also shown that said grant and sale of the tract herein described, constituted
58 a valid title lawfully and regularly derived from the Government of Mexico, and that the said title was perfect and complete at the date of the acquisition of the territory by the United States, and that said grant and sale to said grantee, Don Leon Herreras, constitutes such a valid title that the United States are bound upon the principles of the public law and by the provisions of the treaty of cession to respect it as a valid, complete and perfect title at said date.

V.

That at said trial it was made to appear that every condition and requirement stated in said grant as incumbent upon said grantee to be performed was performed within the time and in the manner stated in the grant.

That the defendant, Santiago Ainsa, Administrator of the Estate of Frank Ely, deceased, has acquired an interest in said lands hereinafter described by conveyances executed to him by the heirs at law of the original grantee.

That the defendant, Santiago Ainsa, Administrator of the Estate of Frank Ely, deceased, did not institute this suit, but was brought into Court upon petition of the United States under the provisions of Section eight of the Act of March 3rd, 1891, creating this
59 Court and defining its jurisdiction and powers, and that thereafter, to-wit: on the 20th day of November, 1892, said Ainsa, Administrator as aforesaid, by leave of Court, filed his amended answer to the petition of the United States by and in which the said Ainsa, Administrator as aforesaid, sets forth the nature and extent of his title, and declaring and alleging that he is entitled to a confirmation of his said grant in accordance with the metes and bounds set forth in the original survey and grant of the same and

prayed that the validity of his said title may be inquired into and decided and that his title to said lands be declared valid and that the said grant be adjudged to be and always to have been a complete and perfect and unconditional title in fee and that defendant be adjudged to be the owner in fee thereof. And for such other and further relief as to the Court may seem meet and proper in the premises. That thereafter, to-wit, on the 20th day of March, 1894, the United States filed its reply thereto putting at issue all allegations which were not admissions of the allegations contained in the petition, and prayed that defendants be put to their proof as to the truth of the same.

That thereafter, to-wit, on the 30th day of March, 1894, this Court after due deliberation ordered, adjudged and decreed that the claims of the various defendants as set forth in their answers on
60 file in said cause for a confirmation of the lands described therein were disallowed and rejected.

That from said decree so entered by this Court, the said Santiago Ainsa, Administrator of the estate of Frank Ely, deceased, regularly took to and prosecuted in the Supreme Court of the United States an appeal, and that thereafter, on May 31st, 1898, the said Supreme Court of the United States, upon the pleadings and the evidence, reversed the decree of this Court and remanded said cause to this Court for further proceedings in conformity to the opinion of said Court, which is fully set forth and embodied in the case of Ely's administrator vs. United States, 171 U. S., pp. 220-241.

Now, therefore, in consideration of the premises, and by virtue of the power vested in this Court by the provisions of the Act of Congress, approved March 3, 1891, and in obedience to the mandate of the Supreme Court of the United States, confirmation is hereby made and decreed of the title to the said Don Leon Herreras, and his heirs, successors in interest and assignns in and to that portion of the San Jose de Sonoita Private Land Claim, situate in the County of Santa Cruz, Territory of Arizona, more particularly described as follows:

61 Beginning at the old abandoned place of Sonoita, which was correctly designated as the point marked "initial mon." on the map of the San Jose de Sonoita Private Land Claim, surveyed and drawn by George J. Roskruge, County Surveyor, June, 1889, and filed in this cause March 20th, 1894, as defendant's Exhibit 11 from which central initial monument run north 52 degrees east, 05 cords or eighty thousand six hundred and ninety and eighty-five hundredths (8690.85) feet to the northeast center monument; from said northeast center monument run south 60 degrees east, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3348.75) feet to the southeast monument, and from said northeast center monument run north 56 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the northeast monument; returning to the central initial monument run south 79 degrees east, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the east center monument; and

from said initial monument, run also north 75 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the west center monument; from said east center monument run south 70 degrees west; 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-
62 five hundredths (39591.65) feet to the southwest monument, and from west center monument run south 72 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the northwest monument and connect the northwest and southwest monuments by a straight line.

VII.

This confirmation is made subject to such of the limitations and terms of the act of Congress, approved March 3, 1891, as are applicable hereto, and the bill of the United States of America to all the said above described land is hereby dismissed.

Done in open Court at Santa Fe, New Mexico, this 6th day of August, 1902.

JOSEPH R. REED,
Chief Justice, Court of Private Land Claims.

In the United States Court of Private Land Claims, Sitting at Phœnix, Arizona.

Be it remembered that on the 12th day of April, 1904, the following, among other proceedings, were had in said court:

63 **No. 40, San Jose de Sonoita Claim.**

UNITED STATES OF AMERICA, Plaintiff,
vs.
SANTIAGO AINSA, Adm. of the Estate of Frank Ely, Deceased; Rollin Richardson, Don A. Sanford, William S. Fleming, C. C. Watkins, Defendants.

Now on this day this cause came on for hearing on the matter of the approval of the survey of the lands in question, made by the Department of the Interior, and the petition of Etta L. Sanford and Amo S. McKee, Esq., that certain lands therein described be excluded from the operation of any order or judgment, approving said survey.

Matt G. Reynolds, Esq., appearing for said petitioners and Selim M. Franklin, Esq., appeared for the grant claimants.

The Court, having heard the arguments of counsel thereon, and being advised in the premises, overrule*d* and dismisses said petition, and it further appearing to the Court that said survey substantially conforms with the decree heretofore entered by the Court in this cause;

64 It is ordered that the survey of the grant in this case be approved and the Clerk is ordered to endorse such approval

thereof on the plat of the survey, returned to the Court by the Commissioner of the General Land Office.

JOSEPH R. REED,
Chief Justice.

The findings and decree of the District Court upon the trial of this case, are as follows:

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Adm'r, with Will Annexed, of the Estate of Frank Ely, Deceased, Plaintiff,

vs.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, FREDERICK Maish, Thomas Driscoll, C. C. Watkins, Jacob A. Linder, Wm. De Vess, and Wm. S. Fleming, Defendants.

65 *Findings of Fact and Conclusions of Law.*

This cause come on regularly for trial on the 24th day of June, 1907, before the Court, sitting without a jury, Selim M. Franklin, Esq., appearing as attorney for plaintiff and Messrs. Kingan and Wright, appearing as attorneys for defendant, R. R. Richardson, and William Lovell, Esq., appearing as attorney for the defendants, Thomas Driscoll and Frederick Maish. The defendants, D. A. Sanford, Robert V. Bloxton, C. C. Watkins and William S. Fleming, having each been duly served with process and each having appeared and filed his answer to the complaint herein, and the defendants, Jacob A. Linder and Wm. De Vess having been regularly served with process and having failed to appear and answer to plaintiff's complaint herein and the legal time for appearing and answering having expired and no answer or demurrer having been filed by any or either of said defendants, the default of each of said defendants, Jacob A. Linder and Wm. De Vess was duly entered, according to law.

Thereupon evidence was introduced by the respective parties and the cause having been submitted to the Court for its decision,
66 and the Court, being fully advised in the premises, does now make the following

Findings of Fact.

I.

That Frank Ely, original plaintiff in this action, was, at the time of the commencement of this suit, the owner in fee of all that certain piece or parcel of land in the complaint and herein described as follows, to-wit:

That portion of the San Jose de Sonoita Private Land Claim, situated in township twenty-two south, ranges fourteen, fifteen and six-

teen east of Gila and Salt River Meridian in the County of Santa Cruz, Arizona, and along the Sonoita Creek and Canyon, and containing an area of five thousand one hundred and twenty-three acres and forty-two hundredths of an acre, according to the plat and survey of said claim, approved by the Court of Private Land Claims April 12th, 1904; being more particularly bounded and described as follows, to-wit: Beginning at the old abandoned place of Sonoita, which was correctly designated as the point marked "initial mon." on the map of the San Jose de Sonoita Private Land Claim, surveyed and drawn by George J. Roskruge, County Surveyor, June, 1889, and filed in said Court of Private Land Claims March 20th,
67 1894, as defendant's Exhibit 1; from which central initial monument run north 52 degrees east, 63 cords, or eight thousand six hundred and ninety and eighty-five hundredths (8690.85) feet to the northeast center monument; from said northeast center monument run south 60 degrees east 25 cords, or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the southeast monument and from said northeast center monument run north 56 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy five hundredths (3448.75) feet to the northeast monument; returning to the central initial monument run south 79 degrees east, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the east center monument, and from said central initial monument run also north 75 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the west corner monument, from said east center monument run south 70 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the southwest monument, and from said west center monument run south 72 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the northwest monument and connect the northwest and
68 southwest monuments by a straight line.

That said Frank Ely was such owner at the time of his death; that the plaintiff, Santiago Ainsa, Administrator with will annexed of the estate of Frank Ely, deceased, is now the owner in fee of all said land and premises aforesaid.

II.

That the defendants in said action, and each of them, have no right, title or interest in or to said piece or parcel of land, aforesaid, or any part thereof.

Conclusions of Law.

The Court finds that said plaintiff is the owner in fee of all the above described piece or parcel of land, aforesaid, and is entitled to a judgment and decree, establishing his estate therein and quieting his title as against each and all of the defendants in this action.

Dated this 28th day of September, 1907.

JOHN H. CAMPBELL, *Judge.*

69 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Plaintiff,

vs.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. Watkins, Jacob A. Linder, Wm. De Vess, and Wm. S. Fleming, Defendants.

This cause came on regularly for trial on the 24th day of June, 1907, before the Court, sitting without a jury, Selim M. Franklin, Esq., appearing as attorney for plaintiff, and Messrs. Kingan and Wright, appearing as attorneys for defendant, R. R. Richardson, and William Lovell, Esq., appearing as attorney for defendants, Thomas Driscoll and Frederick Maish, the defendants, D. A. Sanford, Robert V. Bloxton, C. C. Watkins and William S. Fleming, having
70 each been duly served with process and each having appeared and filed his answer to the complaint herein, and the defendants, Jacob A. Linder and Wm. De Vess having been regularly served with process and each having appeared and filed his answer to the complaint herein, and the defendants, Jacob A. Linder and Wm. De Vess having been regularly served with process and having failed to appear and answer to plaintiff's complaint herein, and the legal time for appearing and answering having expired and no answer or demurrer having been filed by any or either of said defendants, the default of each of said defendants, Jacob A. Linder and Wm. De Vess was duly entered, according to law.

Thereupon evidence was introduced by the respective parties and the cause, having been submitted to the Court for its decision and the Findings of Fact and Conclusions of Law in this case having been heretofore made and filed with the Clerk of this Court by the Judge thereof, and the Court being fully advised in the premises:

Now, therefore, it is ordered, adjudged and decreed that the plaintiff, Santiago Ainsa, Administrator with will annexed of the estate of Frank Ely, deceased, do have judgment and decree, as
71 prayed for in his complaint, against each and all the defendants, R. R. Richardson, Robert V. Bloxton, D. A. Sanford, Frederick Maish, Thomas Driscoll, C. C. W-tkins, Jacob A. Linder, Wm. De Vess and Wm. S. Fleming; that all adverse claims of said defendants, and each of them, and all persons claiming or to claim said premises in said complaint and hereinafter described, or any part thereof, through said defendants or either or any of them, are hereby adjudged to be invalid and groundless, and that the plaintiff, said Santiago Ainsa, Administrator with will annexed of the estate of Frank Ely, deceased, be, and he hereby is declared and adjudged to be the true and lawful owner of the lands and premises described in the complaint and hereinafter described and of every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims and demands or pretenses of the said defendants, R. R.

Richardson, Robert V. Bloxton, D. A. Sanford, Frederick Maish, Thomas Driscoll, C. C. Watkins, Jacob A. Linder, Wm. De Vess and Wm. S. Fleming, and either or any of them, and that they, the said defendants, and each of them and all persons claiming or to claim under them or any or either of them, are hereby perpetually stopped and enjoined from setting up any claim thereto or to any part thereof.

Said lands and premises are bounded and described as follows, to-wit:

72 That portion of the San Jose de Sonoita Private Land Claim, situated in township twenty-two south, ranges fourteen, fifteen and sixteen east of Gila and Salt River Meridian, in the County of Santa Cruz, Arizona, and along the Sonoita Creek and Canyon, and containing an area of five thousand one hundred and twenty-three acres and forty-two hundredths of an acre, according to the plat and survey of said claim, approved by the Court of Private Land Claims April 12th, 1904, being more particularly bounded and described as follows, to-wit: Beginning at the old abandoned place of Sonoita, which was correctly designated as the point marked "initial mon." on the map of the San Jose de Sonoita Private Land Claim, surveyed and drawn by George J. Roskruge, County Surveyor, June, 1889, and filed in said Court of Private Land Claims March 20th, 1894, as defendant's Exhibit 1; from which central initial monument run north 52 degrees east, 63 cords or eight thousand six hundred and ninety and eighty-five hundredths (8690.85) feet to the northeast center monument; from said northeast center monument run south 60 degrees east, 25 cords, or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the southeast monument; and from said northeast center monument run north 56 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet

73 to the northeast monument; returning to the central initial monument run south 79 degrees east, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the east center monument, and from said central initial monument run also north 75 degrees west, 25 cords or three thousand four hundred and forty-eight and seventy-five hundredths (3448.75) feet to the west center monument, from said east center monument run south 70 degrees west, 287 cords or thirty-nine thousand five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the southwest monument, and from said west center monument run south 72 degrees west, 287 cords or thirty-nine thousand and five hundred and ninety-one and sixty-five hundredths (39591.65) feet to the northwest monuments and connect the northwest and southwest monuments by a straight line.

It is further adjudged that plaintiff do have and recover from defendants his costs in this action, hereby taxed at 346.55 dollars.

Done in open Court, this 28th day of September, 1907.

JOHN H. CAMPBELL, *Judge*

74 Defendant, R. R. Richardson, filed his motion for new trial, which was overruled, and he excepted thereto and gave notice in open Court of appeal to the Supreme Court of Ari-

zona. Said motion for new trial and the minute entry of said District Court, denying the same, and notice of appeal, are as follows:

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Plaintiff,

vs.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. Watkins, Jacob A. Linder, Wm. De Vess, and Wm. S. Fleming, Defendants.

Motion for New Trial.

Comes the defendant, R. R. Richardson, and moves the Court for a new trial in the above entitled case, and for grounds of such motion, shows:

75 I.

That the evidence in said case does not sustain the judgment.

II.

That the evidence is insufficient to sustain each and all of the findings of fact made in said case.

Wherefore, said defendant, R. R. Richardson, prays that a new trial be granted him herein.

JOHN B. WRIGHT,
Attorney for Defendant R. R. Richardson.

76 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

1579.

SANTIAGO AINSA, Administrator, Plaintiff,

vs.

R. R. RICHARDSON et al., Defendants.

Minute Entry of Date October 5th, 1907.

This matter came this day regularly to be heard upon the motion of the defendants for a new trial herein, Selim M. Franklin, Esq., appearing as counsel for the plaintiff, and John B. Wright, Esq., appearing for the defendants. Said matter being fully submitted to the Court without argument, and the Court being fully advised in the premises, does overrule said motion, to which ruling of the Court, the defendants, through their counsel, except and give notice of appeal to the Supreme Court of this Territory.

77 *Stipulation.*

S. M. Franklin, attorney for plaintiff, and John B. Wright, attorney for defendant R. R. Richardson, agree that the foregoing "Agreed Statement of Case," contains the facts pertaining to this case, and brought out by the evidence given at the trial, which, in their opinion, will enable the Supreme Court to determine whether there has been any error in the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for Pima County.

And said Attorneys further agree, that, in the event of the approval and signing of this statement, by the Judge of the said Court, the same shall be filed in the case, and on appeal, shall, when demanded as provided in Paragraph 1582 of the code of Arizona, be transmitted by the Clerk of said District Court to the Supreme Court, together with a certified copy of the bond on appeal, in place of all other portion- of the record, for review as the sole record of the case.

This stipulation and statement of the case is made under and by virtue of the provisions of Paragraph 1522 of the Revised
78 Statutes of Arizona, of 1901, as amended by Act No. 74, page 124 of the session laws of 1907.

Dated this eighteenth day of October, 1907.

SELIM M. FRANKLIN,
Attorney for Plaintiff.
JOHN B. WRIGHT,
Attorney for Defendant R. R. Richardson.

The undersigned Judge of said District Court, who tried said cause, hereby approves the foregoing agreed statement of the case.

In witness whereof I have signed the same on this 22nd day of October, 1907.

JOHN H. CAMPBELL,
Judge of said District Court.

79 (Endorsed:) No. 1024. In the Supreme Court of the Territory of Arizona. R. R. Richardson, et al., Appellants, vs. Santiago Ainsa, Adm'r, etc., Appellee. Statement of the case. Filed May 25, 1908. F. A. Tritle, Jr., Clerk.

80 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Plaintiff,

vs.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick M-ish, Thomas Driscoll, C. C. Watkins, Jacob A. Linder, Wm. De Vess, and Wm. S. Fleming, Defendants.

Appeal Bond.

Know all men by these presents that we, R. R. Richardson as principal, and E. L. Vail and John Mets as sureties, are held and firmly bound unto Santiago Ainsa, Administrator with Will annexed of the Estate of Frank Ely, deceased, in the penal sum — One Thousand Dollars, for the payment of which well & truly to be made, we hereby bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seal- and dated this 14 day of October, 1907.

The condition of the above obligation is such that—

81 Whereas: Heretofore to-wit: on the 28th of September, 1907, the said District Court did, in the above entitled cause, render a judgment and decree for the plaintiff, Santiago Ainsa, Administrator with the Will annexed of the Estate of Frank Ely, deceased, and against the defendant, R. R. Richardson, quieting title to the plaintiff in certain lands in the decree specified and for costs of suit, from which said decree, said R. R. Richardson did pray an appeal to the Supreme Court of the Territory of Arizona.

And whereas, the clerk of said Court fixed the probable amount of the cost of the suit of both the appellate Court and the Court below in the sum of Five Hundred Dollars:

Now therefore, If the said appellant, R. R. Richardson, shall prosecute his appeal with effect, and shall pay all costs which have accrued in the court below, or which may accrue in the appellate Court, then and in that case this bond shall be void, else to remain in full force and virtue.

R. R. RICHARDSON. [SEAL.]
E. L. VAIL. [SEAL.]
JOHN METS. [SEAL.]

82 TERRITORY OF ARIZONA,
Pima County, ss:

E. L. Vail and John Mets being by me first severally and duly sworn, on their several oaths do say, that they are each worth the sum of One Thousand Dollars, the amount for which he has signed the above bond, over and above his just debts and liabilities exclusive of property exempt from execution.

E. L. VAIL.
JOHN METS.

Subscribe- and sworn to before me this 14 day of October, 1907.
[SEAL.] BERTRAM L. HITCH,
Notary Public.
My Commission expires Sept. 20th, 1911.

Endorsements: No. 1579. In the District Court of the First Judicial District in and for Pima County, Arizona. Santiago Ainsa, Administrator etc. vs. R. R. Richardson, et al. Appeal Bond. Approved and filed October 14, 1907. Allan B. Jaynes, Clerk. John B. Wright, for defendant Richardson.

TERRITORY OF ARIZONA,
County of Pima, ss:

83 I, Allan B. Jaynes, Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for Pima County do hereby certify that the attached and foregoing is a true, perfect and complete copy of the Appeal Bond in the case of Santiago Ainsa, Adm'r Plaintiff vs. R. R. Richardson, et al. Defendants, No. 1579 in said Court, as the same appears from the original of the same remaining on file in my office.

Witness my hand and the seal of said Court affixed this 22nd day of October, A. D., 1907.
[SEAL.] ALLAN B. JAYNES, *Clerk.*

(Endorsed:) No. 1024. In the Supreme Court of the Territory of Arizona. Santiago Ainsa Admr., Plaintiff vs. R. R. Richardson, et al., Defendants. Certified copy of Appeal Bond. Filed Oct. 26, 1907. F. A. Tritle, Jr., Clerk. By Angie B. Parker, Deputy.

84 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON et als., Appellants,
v.
SANTIAGO AINSA, Administrator with the Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Stipulation.

It is stipulated between the attorneys for the appellants and appellee in the above-entitled suit, that the same be submitted to the Supreme Court upon briefs filed herein, oral argument being waived.
Dated, Tucson, Arizona, January 11, A. D., 1908.
JOHN B. WRIGHT,
Attorney for Appellant, R. R. Richardson.
SELIM M. FRANKLIN,
Attorney for Appellee.

(Endorsed:) 1024. In the Supreme Court of Territory of Arizona. R. R. Richardson, et al. Appellants vs. Santiago Ainsa, Adm'r with Will Annexed of Frank Ely, deceased, Appellee. Stipulation. Filed Jan'y 13, 1908. F. A. Tritle, Jr., Clerk.

85 In the Supreme Court of the Territory of Arizona.

No. 1024.

R. R. RICHARDSON, Appellant,
vs.
SANTIAGO AINSA, Administrator with the Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Appeal from District Court, Pima County, Before Mr. Justice Campbell.

Mr. J. B. Wright, for appellant.
Mr. S. M. Franklin, for appellee.

Opinion by Sloan, J.

This suit was originally brought in the District Court of Pima County by one Frank Ely in 1887, and was entitled "Frank Ely vs. The New Mexico & Arizona Railroad Company, et al." The complaint was in form one to quiet title, the subject matter of the action being a Mexican land grant situated in Santa Cruz County and known as the Rancho San Jose de Sonoita. The grant, at the time the suit was brought, was unconfirmed. The defendants, of whom there were a large number, demurred to the complaint upon the ground that it did not state a cause of action, in that it
86 appeared therein that the plaintiff was not in the possession of the grant and in order to maintain the action was required to show that he was without adequate remedy at law, and to set up grounds for equitable relief. This demurrer was sustained. This court affirmed this ruling of the District Court, whereupon the plaintiff appealed to the Supreme Court of the United States which reversed the judgment of this court and remanded the cause for trial.

In 1893, Ely having in the meantime died, and Santiago Ainsa, as administrator with the will annexed, having been substituted as plaintiff, the case was tried on its merits and judgment entered dismissing the case upon the ground that the court had no jurisdiction over the subject matter of the action for the reason that it appertained to the title of an unconfirmed Mexican Land grant. This judgment was affirmed on appeal by this court but subsequently reversed by the Supreme Court of the United States. 175 U. S. 91. The holding of the Supreme Court of the United States was that, after the passage of the Act of Congress, approved March 3rd, 1891, establishing the Court of Private Land Claims, the courts of this territory had jurisdiction, as between private parties, to deter-
87 mine the title of an unconfirmed Mexican grant, which had not been rejected by or was not pending before Congress, and which was asserted to be complete and perfect at the date of the cession. It was therefore found that the court had jurisdiction of the case.

The complaint was amended by consent on the 27th day of Sep-

tember, 1907, in the respect that certain defendants were omitted from the suit, among them being the Railroad Company, and certain additional facts being set up.

The essential allegations of this amended complaint are: That the plaintiff, as administrator with the will annexed of the estate of Frank Ely, deceased, is the owner in fee of the grant in question; that at the time of the Gadsden Purchase this grant was complete and perfect; that in 1902 the United States brought suit in the Court of Private Land Claims against plaintiff and the defendants in this suit to try the title of said grant; that thereafter said Court of Private Land Claims confirmed said grant in plaintiff as a valid, complete and perfect grant at the date of the cession, and specifically described the boundaries thereof; that thereafter, in pursuance of said decree of confirmation, the United States issued its patent to said grant
88 to the original grantee from the Mexican government, his heirs, successors in interest, and assigns; that the defendants and each of them were, without any right, title or interest, asserting claims to the lands included within the boundaries of said grant as thus confirmed and patented.

The defendants in their answer, among other defenses set up various patents from the United States issued before the original suit, under the various land laws of the United States, and prayed that these titles be quited as against plaintiff.

The cause was tried upon the issues thus presented and judgment rendered in favor of the plaintiff. From this judgment the defendant, R. R. Richardson, has appealed.

Counsel for appellant has raised two questions by his assignments of error: First, that the lower court had no jurisdiction over the subject matter of the action; Second, that under the provisions of the Act of Congress creating the Court of Private Land Claims appellant's lands, having been theretofore patented by the United States, were eliminated from the grant, notwithstanding the confirmation of the title by the Court of Private Land Claims and the patent from the government.

89 1. The question of jurisdiction, whatever might otherwise have been open to adjudication by us in this respect, has been definitely settled adversely to the contention of appellant by the Supreme Court of the United States upon the second appeal in this cause. The question of jurisdiction was directly decided in that case, and this ruling has become the law of the case.

United States vs. Camou, 184 U. S. 572.
Thompson vs. Maxwell Land Grant and R. Co. 168 U. S. 451.
Snyder vs. Pima County, 6 Ariz. Rep. 41.

2. The Act creating the Court of Private Land Claims conferred upon it jurisdiction in three classes of cases: the first class included suits brought by claimants of Mexican Land grants which, at the time of the passage of the Act, were unconfirmed or not otherwise finally decided upon, and which were not already complete and perfected, to have such grants validated and confirmed and their boundaries ascertained. The second class included suits brought by claimants of grants which had not been acted upon by Congress and which were

asserted to have been complete and perfect at the time of the cession from Mexico to the United States of the territory wherein
90 they might lie, to have the titles to such grants confirmed and their boundaries ascertained. As to such latter cases the act specifically provided that "confirmation shall be for so much land only as such perfected title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States," etc. The third class included suits brought by the United States against claimants of grants who should not voluntarily apply to said court for the confirmation of said grants in cases where, in the opinion of the Attorney General, the titles to such grants should be adjudicated and the boundaries ascertained.

Section 14 of the Act reads as follows: "That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this Act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so
91 sold or granted," etc.

The question presented is whether said Section 14 applies to those cases which, under the provisions of the Act, might be brought against grant claimants who might not voluntarily sue for the confirmation of their titles and whose titles, in suits brought by the United States, should be found by the Court of Private Land Claims to have been complete and perfect, and who should receive patents to the lands included within the boundaries of the grants confirmed to them. It has been held by the Supreme Court of the United States in United States vs. Martinez, 184 U. S. 441, that said Section 14 of the Act does apply to the second class of cases we have enumerated, and that one holding a Mexican land grant by perfect and complete title who brought suit in the Court of Private Land Claims for the confirmation of this title, did so upon the condition that if any portion of such lands might be found to be sold or granted by the United States to another person the title from the United States to such other person should remain valid, and that in such case he might obtain judgment against the United States for the value of the land so granted. We know of no case, how-
92 ever, decided by the Supreme Court of the United States, or by any Federal or State Court in which the precise question here presented has been decided.

The Secretary of the Interior, in the case of Ely's administrator vs. MacKee, 34 L. D. 612, has construed the Act as limiting the application of said Section 14 to cases of confirmations of grants where the grant claimants have brought suit in the Court of Private Land Claims, and as not applying to cases of confirmation of grants in suits brought by the government against claimants who have not voluntarily appeared in said court to obtain the benefits of the Act. The Secretary in his decision points out the distinction between the two classes of claimants and applies to the latter the doctrine ex-

pressed in Ainsa vs. The New Mexico & Arizona Railroad Company, supra, that the private holder of any complete and perfect grant may, at his election, have its validity determined as against the United States in the Court of Private Land Claims, but that in case he should not so elect his title will never-the-less be valid and enforcible in the ordinary courts of justice, and under the treaty with Mexico he is entitled to have his title recognized in the latter courts as the absolute owner in fee of such grant. He distinguishes between
93 the case of one voluntarily seeking relief under the Act in the Court of Private Land Claims and the case of one who was brought into such court at the suit of the United States. The reasoning is that the claimant who chose to avail himself of the Act and who brought suit was bound by the terms imposed, and must be held to have accepted the condition that he should not have decreed to him, in any such suit, land the title to which had passed to other parties from the United States; in the latter case the appearance of the grant claimant not being voluntary, and he not being bound by the Act to invoke the aid of the court in the settlement and confirmation of his title, and having all the title that was necessary to enforce his rights as the owner of the grant in the ordinary courts of justice, the Act should not be construed as intending that the suit brought by the United States should operate arbitrarily to confiscate his claim or any portion thereof against his consent; that before such a construction should be given the Act, it being in derogation of a common law right, it ought to clearly appear from the statute, which, in such case, is to be strictly construed.

The record in this case discloses that the Court of Private
94 Land Claims did not except the lands, or that of any other of the defendants from its decree of confirmation, although by the pleadings it appears that its attention was called to the fact that titles had been issued to portions of the grant by the United States to said defendants. We infer from this, therefore, that the Court of Private Land Claims construed the Act as did the Secretary of the Interior in the MacKee case. The reasoning of the Secretary in the latter case is convincing, and no other authority appearing to the contrary, we adopt his construction of the Act. It follows, therefore, that appellant's lands were not excepted from the confirmation of the grant and from the patent of the government. The judgment is, therefore, affirmed.

RICHARD E. SLOAN,
Associate Justice.

We concur:

EDWARD KENT, *C. J.*
FLETCHER M. DOAN, *A. J.*
FREDERICK S. NAVE, *A. J.*

(Endorsed:) No. 1024. In the Supreme Court of the Territory of Arizona. R. R. Richardson vs. Santiago Ainsa, Adm'r. Opinion. Filed March 27, 1908. F. A. Tritle, Jr., Clerk.

95 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. De Vess, and Wm. S. Fleming, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Motion for Rehearing.

Comes now the Appellant, R. R. Richardson, and moves the Court for a rehearing in the above-entitled cause, upon the ground that the court erred in holding that under the Court of Private Land Claims Act, a claimant of a grant, which was complete and perfect at the time of the Gads-en Treaty, who was forced into the court by action on the part of the United States, is not obliged to forfeit all lands claimed under said grant, which had theretofore been patented by the United States; that the clause in said Court of Private Land Claims Act, providing that the claimant of the grant shall be allowed not to exceed $1.25 per acre for all lands theretofore
96 patented by the United States applies only to cases where the claimant of a perfected grant himself invoked the aid of the court of Private Land Claims to confirm his title.

In support of this motion, the said appellant shows to the court that the said Court of Private Land Claims Act, provides three methods, in which the validity of grants may be determined, as follows:

The first method being for a Grant which was not a complete and perfect grant at the time of the Treaty;

The second method being an application of the claimant of a grant which was completed at the time of the Treaty, to have same confirmed, and

The third being the case of a grant completed at the time of the Treaty, where the United States institutes the action to inquire into the validity of the grant, owing to the election of the grant claimant not to institute the action himself.

After stating these three methods of inquiring into the validity of grants, the said Act then provides—

See Sec. 14, Act of March 3, 1891.

"*If in any case* it shall appear that the lands, or part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person,
97 such title from the United States to such other person *shall remain valid notwithstanding such decree.*"

It is therefore to be seen that three methods, as above stated, are outlined for the trial of title to land grants, and after stating the said three methods, the Act provides that if in any case lands have been patented, such patent shall remain valid.

We submit, therefore, that the Court erred in its construction that

the words "If in any case" referred to but two of the cases and not to the third.

Respectfully submitted,

JOHN B. WRIGHT,
Attorney for Appellant R. R. Richardson.

(Endorsed:) No. 1024. In Supreme Court, Territory of Arizona. R. R. Richardson, et al., appellant, vs. Santiago Ainsa, Adm'r, etc., appellee. Motion for rehearing. Received copy this 4th day of April, 1908. S. M. Franklin, att'y for appellee. Filed April 6, 1908. F. A. Tritle, Jr., Clerk.

98 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. De Vess, and Wm. S. Fleming, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Comes now John B. Wright, attorney for R. R. Richardson, the appellant herein, and gives notice of the appeal from the judgment of this court to the Supreme Court of the United States, and moves the Court that the appeal be allowed, and the said John B. Wright, for the said appellant,

Further Moves the Court that the bond on appeal be fixed in the sum of One Thousand Dollars.

JOHN B. WRIGHT,
Attorney for Appellant Richardson.

(Endorsed:) No. 1024. In the Supreme Ct. Ty. of Arizona. R. R. Richardson, et als., appellants, v. Santiago Ainsa, Adm'r, etc., appellee. Notice of Appeal and for fixing Cost Bond. Filed May 26, 1908. F. A. Tritle, Jr., Clerk.

99 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. De Vess, and Wm. S. Fleming, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Affidavit.

TERRITORY OF ARIZONA,
County of Santa Cruz, ss:

R. R. Richardson, being first duly sworn, on his oath says that he is well acquainted with the S. ½ of the S. W. ¼ of Section

Twelve, and the N. ½ of the N. W. ¼ of Section Thirteen, Township Twenty-two South of Range Fifteen East, Gila and Salt River Base and Meridian, containing One Hundred and Sixty (160) acres; that he is also acquainted with the S. ½ of the N. E. ¼ and the N. ½ of the S. E. ¼ of Section Fourteen, Township Twenty-two South of Range Fifteen east, containing One Hundred and Sixty (160) acres; that he is well acquainted also with the irrigating
100 ditches, fences, houses and other improvements situate upon the above two pieces of land; that said two pieces of land are the lands involved in controversy in the above-entitled cause; that said lands and improvements are worth a large sum of money, to-wit, the sum of Eight Thousand Dollars ($8,000.00), and that the amount in controversy in said above-entitled action exceeds the sum of Five Thousand Dollars ($5,000.00), exclusive of costs and interest.

R. R. RICHARDSON.

Subscribed and sworn to before me on this the 21st day of May, A. D. 1908.

My commission will expire June 8, 1908.

[SEAL.] A. E. CREPIN,
Notary Public.

(Endorsed:) No. 1024. In the Supreme Court of the Territory of Arizona. R. R. Richardson, et al., appellants, vs. Santiago Ainsa, Adm'r, etc., appellee. Affidavit of Amount in Controversy. Filed May 26, 1908. F. A. Tritle, Jr., Clerk.

101 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, Frederick Maish, Thomas Driscoll, C. C. De Vess, and Wm. S. Fleming, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Petition for Appeal.

The above-named appellant, R. R. Richardson, considering himself aggrieved by the judgment made and entered on the 27th day of March, A. D. 1908, and denial of rehearing entered May 18, 1908, in the above-entitled cause, does hereby appeal from said judgment to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that this appeal may be allowed, that citation may issue, and that the transcript of the record proceedings and agreed statement of facts upon which said judgment was made, duly authenti-
102 cated, shall be sent to the Supreme Court of the United States.

Dated: 22nd day of May, A. D. 1908.

JOHN B. WRIGHT,
Attorney for Appellant R. R. Richardson.

The foregoing appeal is allowed and bond fixed in the sum of $1,000.00.

Dated: May 27, 1908.

EDWARD KENT,
Chief Justice Sup. Ct., Ariz.

(Endorsed:) No. 1024. In the Supreme Ct. Ty. of Arizona. R. R. Richardson, et al., appellants, v. Santiago Ainsa, Adm'r, etc., appellee. Petition for Appeal, Order Allowing Appeal and Fixing Bond. Filed May 26, 1908. F. A. Tritle, Jr., Clerk.

103 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, FREDERICK MAISH, THOMAS DRISCOLL, C. C. DE VESS, and WM. S. FLEMING, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Assignment of Errors.

The appellant, R. R. Richardson, prays an appeal from the final decree and judgment of this Court to the Supreme Court of the United States, and assigns for errors,

1st. Because the Court erred in holding that the lower Court had jurisdiction, in that the cause was originally commenced by complaint filed in the lower Court, to-wit, in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, on June 24, 1887, about three years prior to the passage of the Court of Private Land Claims Act, being the
104 act of Congress approved March 3, 1891, and the decision of the Supreme Court of the United States found in — 175 U. S., at page 44, in which it was held that the court did have jurisdiction, was decided upon a misapprehension of the facts.

2d. Because the Court erred in holding that under the Court of Private Land Claims Act, to-wit, the Act of Congress approved March 3, 1891, the claimant of a Grant, which grant was a complete and perfect one at the time of the Gadsden Treaty, which claimant was forced into the court by action on the part of the United States is not obliged to forfeit all lands claimed under said grant, which had theretofore been patented by the United States.

3d. Because the Court erred in holding that the clause in said Court of Private Land Claims Act, providing that the claimant of a grant shall be allowed not to exceed $1.25 per acre for all land theretofore patented by the United States, applies only to cases where the claimant of a perfected grant himself invoked the aid of the Court of Private Land Claims to confirm his title, and not to cases where the United States forces such claimant into the said Court.

105 And appellant, R. R. Richardson, prays for an order that the decree and judgment by this Honorable Court in this case made, may be suspended pending the appeal.

JOHN B. WRIGHT,
Attorney for Appellant R. R. Richardson.

(Endorsed:) No. 1024. In the Supreme Court of the Territory of Arizona. R. R. Richardson, et al., appellant, vs. Santiago Ainsa, Adm'r, et al., appellee. Assignment of errors. Filed May 26, 1908. F. A. Tritle, Jr., Clerk.

106 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, FREDERICK MAISH, THOMAS DRISCOLL, C. C. DE VESS, and WM. S. FLEMING, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Cost Bond on Appeal.

Know all men by these presents:

That we, R. R. Richardson, principal, and E. L. Vail and John W. Bogan as sureties, are held and firmly bound unto Santiago Ainsa, Administrator with Will Annexed of the Estate of Frank Ely, deceased, in the full, and just sum of one thousand dollars ($1000) to be paid to the said Santiago Ainsa, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

107 Sealed with our seals and dated this 1st day of June, in the year of our Lord One Thousand Nine Hundred and Eight.

Whereas, lately, at a Supreme Court for the Territory of Arizona, holden on the 27th day of March, A. D. 1908, in a suit depending in said court between R. R. Richardson, Robert V. Bloxton, D. A. Sanford, Frederick Maish, Thomas Driscoll, C. C. De Vess and Wm. S. Fleming, appellants and Santiago Ainsa, Administrator with Will Annexed of the Estate of Frank Ely, deceased, appellee, a judgment was rendered against the said R. R. Richardson, Robert V. Bloxton, D. A. Sanford, Frederick Maish, Thomas Driscoll C. C. De Vess and Wm. S. Fleming, and the said R. R. Richardson having obtained an appeal and filed a copy thereof in the clerk's office of the said Court, to reverse the decree and judgment in the aforesaid court, and the citation directed to the said Santiago Ainsa, Administrator with Will Annexed of the estate of Frank Ely, deceased, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, holden at the City of Washington, District of Columbia, on the — day of ——, next.

Now, the condition of the above obligation is such that if
108 the said R. R. Richardson shall prosecute his appeal to effect and answer all damages and costs, if he fails to make his plea good, then the above obligation to be void, else to remain in full force and effect.

R. R. RICHARDSON.
E. L. VAIL.
JOHN W. BOGAN.

Signed, sealed in the presence of
JOHN B. WRIGHT.
LENNA H. BURGES.

TERRITORY OF ARIZONA,
County of Pima, ss:

E. L. Vail and John W. Bogan as sureties on the above-entitled bond, being first duly sworn, on their oaths, each for himself and not one for the other, says: That he is worth the sum of One Thousand Dollars ($1000) being the amount for which he has become surety in the above bond, in property exempt from execution, and which is subject to forced sale, and that he is a householder or free-holder in said territory.

E. L. VAIL.
JOHN W. BOGAN.

109 Subscribed and sworn to before me on this the First day of June, A. D., 1908.
My commission will expire Dec. 5, 1911.
[SEAL.] LENNA H. BURGES.
Notary Public.

Approved.

EDWARD KENT,
Chief Justice.

(Endorsed:) No. 1024. In the Supreme Court of the Territory of Arizona. R. R. Richardson, et al. appellants, vs. Sanitago Ainsa, Adm'r etc., Appellee. Cost Bond on Appeal to Supreme Court of U. S. Filed June 2, 1908. F. A. Tritle, Jr., Clerk.

110 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 14th day of January A. D., 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1024.

R. R. RICHARDSON, Appellant,
vs.
SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

At this day it is ordered by the Court that this cause be submitted on briefs.

And afterwards and upon to-wit the 27th day of March A. D., 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order and judgment, inter alia, was had and entered of record in said Court in said cause, which said order and judgment is in words and figures, as follows, to-wit:

111 No. 1024.

R. R. RICHARDSON, Appellant,
vs.
SANTIAGO AINSA, Administrator with the Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises: It is ordered that the judgment of the District Court be and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the Appellee herein do have and recover of and from R. R. Richardson, Appellant herein and E. L. Vail and John Mets, sureties on appeal bond herein, his costs in this court, taxed at thirty-two and 60/100 ($32.60) Dollars, together with his costs in the court below in this cause incurred.

And afterwards and upon to-wit the 18th day of May, A. D., 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

112 No. 1024.

R. R. RICHARDSON, Appellant,
vs.
SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

It is ordered that the Motion for Re-hearing filed herein by Appellant, be submitted.

And afterwards and upon to-wit the 19th day of May A. D., 1908, the same being one of the regular juridical days of the January Term A. D., 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1024.

R. R. RICHARDSON, Appellant,
vs.
SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

It is ordered that the Motion for Re-hearing filed herein by Appellant, and heretofore submitted, be and the same is, hereby denied.

113 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 112 inclusive, contain a true and complete copy of the Statement of the Case; Appeal Bond; Stipulation; Opinion of the Court; Motion for Re-hearing; Notice of Appeal; Affidavit of Amount in Controversy; Petition for and Allowance of Appeal; Assignment of Errors; Cost Bond on Appeal; and all orders and proceedings of said Court had and entered of record, in case No. 1024, R. R. Richardson, Appellant, vs. Santiago Ainsa, Administrator with the Will annexed of the Estate of Frank Ely, deceased, Appellee, as the same remain on file and of record in my office.

Also that the attached Citation is the original Citation issued by the said Supreme Court of the Territory of Arizona in said above entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this 10 day of July, 1908.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

114 In the Supreme Court of the Territory of Arizona.

R. R. RICHARDSON, ROBERT V. BLOXTON, D. A. SANFORD, FREDERIC MAISH, THOMAS DRISCOLL, C. C. De Vess and Wm. S. Fleming, Appellants,

v.

SANTIAGO AINSA, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Appellee.

Citation.

The President of the United States to Santiago Ainsa, Administrator with Will Annexed of the Estate of Frank Ely, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, sixty days from the date hereof, pursuant to an appeal duly allowed by the Supreme Court of the Territory of Arizona, and filed in the Clerk's office of said court on the 26th day of May, A. D. 1908, in a cause wherein R. R. Richardson, Robert V. Bloxton, D. A. Sanford, Frederick Maish, Thomas Driscoll, C. C. De Vess and Wm. S. Fleming are appellants, and you are Appellee, to show cause, if any, why the decree and judgment rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Kent, Chief Justice of *of*
115 the Supreme Court of the Territory of Arizona, this 4 day of June, A. D. 1908.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

Service of a copy of the within citation admitted this 9 day of June, A. D. 1908.

SELIM M. FRANKLIN,
Attorney for Appellee.

116 [Endorsed:] No. 1024. In the Supreme Court of the Territory of Arizona. R. R. Richardson et al., appellants, vs. Santiago Ainsa, adm'r, appellee. Citation. Filed June 10, 1908. F. A. Tritle, Jr., clerk. John B. Wright, Attorney for Appellant, R. R. Richardson.

Endorsed on cover: File No. 21,261. Arizona Territory supreme court. Term No. 199. R. R. Richardson, appellant, vs. Santiago Ainsa, administrator with will annexed of the estate of Frank Ely, deceased. Filed July 15th, 1908. File No. 21,261.

Office Supreme Court, U. S.
FILED.
OCT 25 1909
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1909.

No. [redacted]28.

FEDERAL CASE No. 21,261.

R. R. RICHARDSON, APPELLANT,

v.

SANTIAGO AINSA, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF FRANK ELY, DECEASED, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANT.

S. L. KINGAN,
Attorney for Appellant.

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POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1909.

No. 199.

FEDERAL CASE No. 21,261.

R. R. RICHARDSON, APPELLANT,

v.

SANTIAGO AINSA, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF FRANK ELY, DECEASED, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANT.

Statement of the Case.

The record of this case discloses that on May 15, 1825, the Mexican Government granted the lands here in controversy to one Herreras. The appellee claims through this said Herreras.

In 1854 the Gadsden Purchase Treaty was ratified, and the land embraced in said treaty includes the lands here in issue. This treaty, referring to the rights of Mexican grant claimants to land embraced in such ceded district, makes provisions in the following words, to wit (7 Fed. Stat. Anno., 705):

> "ART. V. All of the provisions of the Eighth * * * Article of the Treaty of Guadalupe Hidalgo shall apply * * * as fully and effectually as if the said article were herein again recited and set forth."

And article eighth of the Treaty of Guadalupe Hidalgo is as set forth in the following words, to wit (7 Fed. Stat. Anno., 696):

> "ART. VIII. * * * In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States."

On July 22, 1854, a statute was passed by the Congress of the United States giving Mexican grantees of land, embraced in the ceded territory, the right to establish their claims to such land before Congress, if they so desired.

In 1879 and 1880, respectively (which will be noticed was twenty-five years after the Gadsden Purchase Treaty), two patents were issued by the United States to land embraced within the land claimed by the Mexican grant claimants. These two tracts of land, patented as homesteads, are the two in issue in this case, and claimed by the appellant through the patents from the United States to the homesteaders. Thus the appellee claims through a Mexican grant, and the appellant claims through United States patents. Since the respective years 1879 and 1880, the appel-

lant and his grantors have lived continuously on and extensively cultivated the land and improved it.

On December 30, 1879, the Mexican grant claimant filed his request before the surveyor general to have a report upon his grant, the said request being made under and in pursuance of the statutes found in 10 Stat. at Large, 308, and 16 Stat. at Large, 304. Nothing was done as to passing a report upon the said grant.

On June 24, 1887, eight years after the first patent had been granted by the United States, the appellee filed proceedings to quiet title to these two pieces of land here in controversy, the action being instituted in the District Court of Arizona in and for the county of Pima. The appellant objected to the jurisdiction of the court, and was sustained. The appellee appealed to the Arizona Supreme Court, which court upheld the decision of the lower court. On appeal to the Supreme Court of the United States the decision was reversed, the *grounds* for the reversal being on their face diametrically opposed to the *conclusion*.

No. 2 Ainsa *v.* N. M. Ry., 175 U. S., 91.

On March 3, 1891, the Congress of the United States passed a statute known as the "Court of Private Land Claims Act," which created said court and determined its jurisdiction.

The year following this statute, to wit, October 19, 1892, the United States brought suit under the statute, against the Mexican grant claimant (appellee here), to have the boundaries of the grant determined and established and put on record after confirmation.

In this case the United States gained a decision. On the appeal to the Supreme Court of the United States the decree was reversed.

Ely's Adm'r *v.* U. S., 171 U. S., 220.

Pursuant to the decree of the United States Supreme Court, on October 9, 1906, the Mexican grant claimant ob-

tained a patent from the United States, "limited to the terms of the act of Congress passed March 3, 1891," *i. e.*, the Court of Private Land Claims Act. For the convenience of the court, the pertinent parts of this act are printed in full at the end of this brief and marked "Exhibit A."

After the Supreme Court of the United States had determined and given its decision as to the jurisdiction of the Arizona court, in the original proceeding in this case to quiet title, the case then came up again on its merits in the said district court of Arizona. Judgment was decreed for the appellee. The decision was upheld in the Supreme Court of Arizona (95 Pac., 103). The Arizona Supreme Court based its decision upon the decision of Ely's Administrator *v.* MacKee, 34 Land Decisions, 612, saying that the "reasoning of the Secretary in that case is convincing, and no other authority appearing to the contrary, we adopt his construction of the act," the whole case devolving to a great extent upon the construction of section 14 of the Court of Private Land Claims Act of March 3, 1891.

The said "Court of Private Land Claims Act" should be considered in the proper presentation of the facts.

1. Section 6 thereof provides that the claimants of grants which have not been confirmed, and which "are not already complete and perfect," may file a written petition in writing, setting up facts enumerated, and praying that title thereto be inquired into and decided, and section 12 provides that if such claimants do not file such petitions within two years, their claims will be construed as abandoned.

The Sonoita grant, which is the subject of this litigation, does not come within the above provisions, as it was a complete and perfect grant.

2. Section 8 of said act of Congress provides that claimants of a grant, where title was complete and perfect when the United States acquired the lands from Mexico, may, but are not obliged to apply to the court for confirmation of the grant.

Said Sonoita grant does not come within the above provisions, as the claimants thereto did not avail themselves of their right to apply for a confirmation.

3. The third paragraph of said section 8 provides that if a claimant does not apply for a confirmation of a complete and perfect grant, as aforesaid, that the United States may by petition institute a proceeding against such claimant, praying that the title to such grant be adjudicated; and in this event, the said court shall "determine the questions stated in such petition," and "determine the matter according to law, justice and the *provisions of this act*," and "subject in this respect to all the provisions of this section applicable thereto."

Said Sonoita grant *does* come within the above provisions, as the United States did institute the proceedings in reference to its confirmation.

4. Section 14 of said act of Congress, provides that *"if in any case* it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person, shall remain valid, notwithstanding such decree," and that claimants can get not to exceed $1.25 per acre for such lands.

The suit in the United States land court, as stated, was commenced by the Government against the appellee herein, under the third paragraph of section 8 of the act creating that court. It was instituted on October 19, 1892. On November 25th of the same year, the appellee herein filed his answer in the action.

Thereafter, and on March 20, 1894, the appellee herein filed an amended answer to the said suit of the Government. This amended answer set up his title in full, and prayed that his title be declared valid, and that he be adjudged the owner in fee thereof.

The Government in its said petition against appellee

herein, in the Court of Private Land Claims, alleged that Richardson (appellant herein) owned certain patented lands within the boundaries of the alleged land grant, and so made Richardson a party defendant. The appellee herein, in his said amended answer, admitted the patents, but denied Richardson's ownership. Richardson did not enter any appearance in the said suit in the Court of Private Land Claims.

Specifications of Error.

I. The court erred in holding it had no jurisdiction, because the decision of the United States Supreme Court was decided, on its face, under a misapprehension of material fact.

II. The court erred in its holdings that section 14 of the Court of Private Land Claims, act of March 3, 1891, did not eliminate from the Mexican grant all lands theretofore patented by the United States, contained within its boundaries.

III. The court erred in holding that the payment of money for land patented, applies only where claimant of a perfected grant invokes the aid of the Court of Private Land Claims to confirm his title, and not to cases where the United States forces such claimant into said court.

Argument of Appellant.

First Specification of Error.

While it is true that the Supreme Court of the United States has already once decided in this case (Ainsa *v.* N. M. Ry., 175 U. S., 91) that the district court of Arizona did have jurisdiction, yet, from the very face of the decision it is apparent that the *grounds* supporting the decision are diametrically opposed to the *conclusion* arrived at, so that it

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is patent from the decision itself that the decision should have been to the contrary.

On July 22, 1854 (10 Stat. at Large, 308), the Congress of the United States made provisions for adjustment of land grants in New Mexico, which then included Arizona, and on July 15, 1870 (16 Stat. at Large, 304), the Congress extended the provision of the former act to Arizona.

The above laws remained in active force and effect until the act of Congress of March 3, 1891, creating the Court of Private Land Claims.

Between the 22d of July, 1854, and the 3d day of March, 1891, the only tribunal, therefore, that had jurisdiction to try title to land grants was the surveyor general of New Mexico and Arizona and the Congress of the United States.

This has been directly decided by this court.

Astiazaran *v.* Santa Rita M. Co., 148 U. S., 80.

This suit was instituted on June 24, 1887, or almost four years prior to the enactment of the Court of Private Land Claims Act. Therefore, under the decision of Astiazaran *v.* Santa Rita Mining Company, aforesaid, the court had no jurisdiction.

The Supreme Court of the United States, however, committed a grave error, through a mistake of fact, when it decided that our lower court had jurisdiction of this identical case.

Ainsa, Adm'r, *v.* U. S., 175 U. S., 91.

It will be noted that said decision contains four lines as follows:

> "In No. 2, Ainsa *v.* New Mexico and Arizona Railway Company, a similar case submitted by the same counsel at the same time, judgment was likewise reversed."

Therefore, we should examine case No. 1, which is that of Ainsa *v.* New Mexico and Arizona Railroad, 175 U. S., 76, and see what was decided.

It is there found that that case, to-wit, case No. 1, was instituted June 1, 1892, or about one year subsequent to the passage of the Court of Private Land Claims Act. Case No. 2, however, was instituted June 24, 1887, or about four years prior to the passage of the Court of Private Land Claims.

In case No. 1, Justice Gray approves of the decision in the Astiazaran *v.* Santa Rita Mining Company case, but says that inasmuch as the case was instituted subsequent to the Court of Private Land Claims Act, the Astiazaran case is not pertinent, and so finds the lower court had jurisdiction.

It is evident, therefore, that the Supreme Court, in deciding case No. 2, did so under a clear misconception of the facts, and its decision therefore is not binding upon this court; but the decisions in the Astiazaran case, as well as in case No. 1 of Ainsa *v.* New Mexico and Arizona Railroad, are binding. The very facts and arguments in said case No. 1 defeat the conclusion reached in said case No. 2.

It is immaterial how the Supreme Court of the United States came to make its said error, whether through stipulations of the parties or otherwise, as jurisdiction cannot be stipulated, and it is always subject to be questioned by a litigant.

Inasmuch as no case exactly in point has ever been found, we urge that the usual rule is not applicable in this case, and that the previous decision as to jurisdiction should be changed to the conclusion derived from the grounds cited in support of the correct decision.

Second and Third Specifications of Error.

Because both the second and third specifications of error come under the same general subject, they will be treated together.

In appellee's previous brief on appeal to the Supreme Court of Arizona, two arguments were advanced against the validity of the patents to the two pieces of land in contro-

versy, viz., (*a*) that the land patented was never public land; and (*b*) that it had been unlawfully patented because a statute had reserved it from being open to homestead.

(*a*) *Lands never were public lands of United States.*

It was contended that the lands covered by the patents of the United States never were public lands because they had been included in a Mexican grant to a private person, and that the United States was bound to respect his title; therefore the lands were always in private ownership, and could not have been thrown open to public settlement.

In reply to this argument we beg to call the attention of the honorable court to the phraseology of the Gadsden Treaty. No express words of "purchase" are given, but the common acceptance of the treaty is that it was a purchase, and the respondent himself seems to concede this. It seems to be conceded that the United States obtained jurisdiction over all the land purchased and also became owner of all the land not included in Mexican grants to individuals. This being the position of the United States, that it was owner of all the land not included in grants to individuals, it becomes important that the United States be informed of the precise land claimed by Mexican grant claimants, in order that the public lands of the United States be definitely ascertained. Until the exact extent of the public lands were known the United States would not be warranted in allowing any of the land to be settled upon as public land.

Immediately after the Gadsden Treaty was ratified a statute was passed whereby Mexican grant claimants could have their claims determined and put on record. This statute is found in 10 Stat. at Large, 308, and again in 16 Stat. at Large, 304. It provides that Mexican grant claimants may submit their claims to the surveyor general, who will examine into their origin, nature, and extent, and make reports thereon to Congress. Thus the United States will

be able to distinguish the grants reported, and separate them from the public domain.

It must follow, therefore, that all the land ceded belonged to the United States except the interests of Mexican grant claimants, and a statute was passed giving these grant claimants a right and an opportunity to establish their claims of record. But the embarrassing situation in which the United States would be placed if the Mexican grant claimants delayed in having their land put on record, was not considered by the court below, and that was the embarrassing situation which happened in this case. No one knew anything about the claim for over twenty-five years. What could the United States do? How was the United States to know that certain particular localities were not public lands? The respondent claimed that the lands in controversy never were public lands. For over twenty-five years, the Mexican grant claimant refused to give any notice of his claim. If the Mexican grant claimant had full and complete title, why did he not put it on record, and why did he allow the United States, and the homesteaders, for twenty-five years to believe that it was public land? He was given a means to protect his rights. He did nothing. Necessarily, the United States proceeded on the theory that all the land was public land, unless some one claimed a part and put his claim where it could be notice to the world; and until it was excluded from public settlement, it should be open to the public.

Therefore, we contend, the land was at least *prima facie* public land until notice of a claim by a Mexican grant claimant was filed with the surveyor general; that until such notice was given, the United States had a right to treat the land as public land; and no notice having been given for twenty-five years, the United States was fully able to give such title and patent to the land as would bar the Mexican grant claimants from denying that the lands were public lands.

This we believe completely refutes any claim of the respondent that the lands were not public lands.

(*b*) *Patents void because lands reserved.*

The second argument was to the effect that by statute the lands were reserved from entry, and therefore the agents of the United States could not give patents.

Without considering the element of agency here involved, it is sufficient to state that from the appellee's own showing, in his brief on the appeal to the Arizona Supreme Court, the reservation referred to is where a Mexican grant claimant has submitted his claim to Government inspection and record. A reservation from sale or other disposal refers to known land, not to any unknown claims. Pending a report upon the validity of the claim, the grant is reserved from a settlement. A cursory examination of the statute referred to, 10 Stat. at Large, 308, will show conclusively that the land intended to be reserved is such land as has been submitted to the United States for determination and record.

ARIZONA SUPREME COURT DECISION.

As to the application of the Court of Private Land Claims Act of March 3, 1891, the Arizona Supreme Court held that section 14 of that act did not apply to cases where the Mexican grant claimant was found to have a full and complete title. The court gives four grounds for so deciding, namely, (*a*) That under the Gadsden Purchase Treaty, the Mexican grantee is entitled to have his rights in and to the property granted recognized by the United States Government; (*b*) having been brought before the court *against his wishes*, he is not bound by the statute requiring him to accept money in lieu of patented lands within the boundaries of this grant; (*c*) that the grant claimant had a good title and all the conditions perfected which were necessary to protect the same; (*d*) that the statute is in derogation of a common-law right. This decision takes no notice of any proprietary rights that the United States may have in the land acquired under the Gadsden purchase; it disregards any element of

laches on the part of the Mexican grant claimant, whereby an innocent third party is damaged; it evades the law about the rights of a *bona fide* purchaser for value without notice from one who has a *prima facie* title, caused by the dilatory actions of the real owner; it weighs no element of duty owed by the Mexican grant claimant; it does not consider any element of public welfare or public policy, nor the progress of the United States through the pioneer homesteaders. The decision disregards the very express words of the statute, towit, "if in any case," etc., and it proceeds to originate a distinction from an indivisible statute where it is expressly provided that there are no distinct cases, and where it is the clear intention of the legislators that there shall be no distinction. And, lastly, the decision, instead of treating the statute as having been passed in furtherance of the treaty obligation, treats it as being in derogation thereof.

(*a*) *That under the Gadsden Purchase Treaty, the Mexican grant claimant is entitled to have his rights in and to the property granted recognized by the United States Government.*

There can be no doubt that under the Gadsden Purchase Treaty grantees from Mexico, of land embraced in the ceded district, are entitled to be protected in their property rights, the same as natural-born Americans. This would probably be so even if nothing were provided in the treaty. But that matter is definitely settled in the context of the treaty. We contend that there is nothing in the statute that violates the obligations of the United States under the treaty. The statute here, in pursuance of the treaty, recognizes that the Mexican grant claimant is entitled to be protected in his property rights. And more than this, it provides means whereby the grant claimants could fully protect themselves, and would find ample means for being protected, by the judicial department of the United States, should occasion

arise. There is no confiscation nor deprivation without due process of law. The statute says that under certain circumstances, when land is patented to others, the grantee from Mexico shall take money in lieu of such land. The Congress of the United States decided that money would be a just compensation, and we have no higher authority. Again, this law could only be enforced under certain circumstances which showed negligence on the part of the grant claimant in establishing his claim. Considerable time could have elapsed before anyone was entitled to a patent. Therefore the grant claimant must have delayed so long as to give one a *prima facie* right to a patent. And, even though the statute be in violation of treaty right, there is no other recourse for the judiciary department than upholding the law. The violation of a treaty is not grounds for the court to act upon. The judiciary department must follow the law promulgated by the legislative department. If the legislators choose to violate a treaty, the affair is of a political aspect, and not a matter for the court's jurisdiction.

> "If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican Government, it was a matter of international concern which the two states must determine by treaty, or such other means as enables one state to enforce upon another the obligations of a treaty. This court in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States, as a sovereign power, chooses to disregard."
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> Domiguez *v.* Botiller, 130 U. S., 238.
> Edye *v.* Robertson, 112 U. S., 580.
> *In re* Ah Lung, 18 Fed., 28.
> Horner *v.* U. S., 143 U. S., 570.

But we contend the statute does not violate the treaty. On the contrary, we strenuously contend that it is in *furtherance* of the treaty obligations. And in support of that contention

the statute expressly provides a means by which the grant claimant can establish on record his rights, so that he may be protected, not only against the United States, but all those claiming under the United States. The statute is intended to help him establish his rights and to protect his property. And it gives the Government power to compel him to establish his claim and to determine its boundaries, so that there can never be any conflict between the grant claimant and the Government or any one claiming under the Government.

U. S. *v.* Martinez, 184 U. S., 441.

It is indeed difficult to see how the Government could do any more to protect the grant claimant. It seems absurd that one could argue under a statute, which so clearly shows every possible effort towards good faith and protection of such sacred rights as our national integrity, that the statute here violates the national integrity, and that it destroys rights of our new people, and with a gigantic imperialism overrides the very foundation of our Government—inviolability of natural rights. Our obligation to protect the grant claimants is not absolute; it is only to furnish them the same means as we ourselves enjoy for protecting our property. And it would seem that the courts would lend every aid as to so interpret a statute that it would uphold the integrity of the Government and still not embarrass it in its efforts to carry out its obligations. The Government provides a means whereby its obligations to protect can be availed of by any and all. Then comes a decision that says some parties do not have to avail themselves of this means, but will be protected anyhow, and regardless of whether they try to protect themselves by accepting the aid of the statute or not. Such a construction would embarrass the Government in its efforts to provide a protection. The effect of such a construction is to say that the grantee can continue to sleep on his rights and be perfectly secure, and no one else can have any land in the vicinity of the grant, for fear

the Government might trespass on private ownership, of which it cannot have any possible knowledge. The law gives the grant claimant every possible opportunity to protect and establish his rights so that he may be protected. But why do this if he may, with impunity, negligently or obstinately refuse to so protect himself? When he refuses to give notice of his claim, he obstructs the policy of the United States in granting homesteads on public lands. A homesteader might settle on a quarter section for five years and then find himself with nothing to show for his pioneer work, all because a grant claimant has negligently or obstinately refused to do such acts as would notify all of his rights. The Government, to avoid the embarrassment of injuring the invaluable pioneers, who promote the future expansion of our resources, and in order to protect the grant claimants, has imposed a rule that if the land has been patented to any person, before the grant claimant comes in to establish his record, the patent shall remain, and the grantee must take a money judgment for so much of his land as has been patented by the United States. The decision from which we appeal calls this a violation of a treaty obligation, a violation of national honor and integrity. The decision indirectly puts a premium on negligence on the part of the grantee; embarrasses the Government in carrying out its duties toward all, not only grant claimants, but native Americans as well, and puts a serious impediment before the path of homesteaders on the public lands. The grant claimant may then say, "Let others approach my property at their peril. I know where my boundaries are, but no one else is concerned."

And while the treaty calls upon the United States to recognize rights of grant claimants, yet it is under no obligations under the treaty to allow such claimant to assume such an attitude as that, to the detriment of the Federal Government and all its people.

(*b*) *Having been brought before the court against his wishes, he is not bound by the statute requiring him to accept money in lieu of patented lands within the boundaries of his grant.*

It is with effort that we refrain from breaking out into sarcastic ridicule of a court of last resort that would gravely adopt such grounds as a basis of legal decision for a controversy between parties. We doubt very much if ever there was a party who, having been brought before the court against his wishes, felt that he ought to be bound by its decisions, or the general laws. But that does not make the decision, nor the law, any less binding. The power of the United States Government to bring a party into court and have him bound by the decision is exactly parallel to a suit in partition between two private individuals, or an action to quiet title. It is inconceivable to suppose that in such cases a defendant would not be bound by a law. Yet the court in the Arizona decision, following the decision of the case in 34 L. D., 612, went so far as to say that the defendant was not bound. Not only that, but that he was not bound because he had not *voluntarily* submitted to the court.

Suppose the grantee did have a full and complete title, nothing but a lawsuit could have made him put it on record. No one but the grantee knew anything about the title or boundaries, and there was no way of finding out. And, furthermore, not knowing even *what* was claimed, no one seems to have known *who* was the claimant.

It cannot be denied that the United States was the owner of all the land in the treaty strip not owned by grantees from Mexico. But what land was claimed by Mexican grantees? There was no record of which this country could take notice. Not until 1891 did the Federal Government have any means of finding out, because Congress had not passed any statutes giving the Federal Government the power of obtaining such a record. As soon as the means

were provided, suit was brought. Meanwhile the owners of the grant had done nothing to warn others of their claim; many years had elapsed; homesteads were patented and the land improved. The object of the statute is justice, not confiscation. And the theory underlying it is that, of two parties claiming, the one who has been diligent shall have precedence over the one who has been dilatory. The grant owners have slept on their rights to the injury of the Government and the homesteaders. Obviously the Government and the homesteaders should have precedence.

The argument is that, having been found to have a perfect title to the whole, to then apply the statute of 1891 would amount to a confiscation; hence the statute does not apply to a perfect grant. In other words, a man has a land grant situated in a vast tract of practically unknown country; he has given the world no notice thereof; pioneers come in and settle on certain wild land within the boundaries of such grant and live there for twenty years or more; they cultivate such wild land and claim it as their own; they have no notice of any other interests; they secure for such land the patents of the United States of America, which sovereign had no notice or means of discovering the adverse interests; then the first owner, though he has lulled the pioneers into a false feeling of security and misled the sovereign government, attempts to come in and claim the land and take it away from those pioneers. Such a construction is unjust; and such a ruling is contrary, not only to the spirit of the statute here involved, but contrary to its very wording. The whole spirit of the statute is to protect, at all hazards, those who homestead the land. And the statute expressly says, without any reservation, that if "in any case" the land has been granted, then the Mexican grantee shall take a money judgment instead of that land. Both the spirit and the wording of the statute, as well as plain equity, lead to the incontrovertible conclusion that the money judgment refers to all cases, whether the grant claim-

ant has been brought in voluntarily or involuntarily, and whether he has a complete title or an incomplete title. The object of the statute is to protect those who are willing to pioneer the new country and develop its resources and relieve them from a hidden danger such as is developed in this very action.

If the United States Government had brought the Mexican grant claimant before its courts to have the boundaries ascertained before either the Government or a patentee therefrom had suffered any detriment, then there is no doubt but that the Mexican grant claimant would be entitled to protection of his rights to the whole grant. But there is a new factor entering in this case, *i. e.*, that the United States and patentees therefrom have, without any notice, either actual or constructive, in good faith acted for over twenty years upon the assumption that they were occupying the public domain. All the principles of equity—laches, unjust enrichment, estoppel, fraud, etc.—unite in overthrowing any claim of the Mexican grant claimant to the land in controversy. And besides these equitable principles there are both the spirit and express wording of the statute directly in point, the interpretation of which cannot possibly be distorted to cover imaginary exceptions.

We now discuss a few authorities, selected from decisions of the United States Supreme Court. We first refer to the case of United States *v.* Conway, 175 U. S., 60.

Conway brought suit in the Court of Private Land Claims for confirmation of the Cuyamungue grant. The United States did not answer, but at the trial showed a portion of such grant had been patented to certain Indian tribes. The grant was confirmed, as having been a complete and perfect one at the date of the treaty with Mexico. And the lower court held that inasmuch as the grant was complete and perfect at the time of the treaty, the United States acquired no rights to such lands and that therefore the patent made by the United States to the Indians conveyed nothing.

Further, the lower court held that if the Indians did get any title, by virtue of their patents, the decree of the court confirming the grant, would not affect such title. Therefore said court declined to except out of the decree of confirmation the lands covered by the Indian patents, and the decision, therefore, was upon the same grounds as the lower court in this action, and to the same effect.

After stating the facts substantially as aforesaid the Supreme Court of the United States, in the said case, goes on to say:

> "The decisive question in the case is: whether the lands confirmed by act of Congress * * * to the Indians * * * should have been excepted from the decree of confirmation."

The court argues the matter thoroughly, and concludes as follows:

> "We are therefore of the opinion that the decree of confirmation should have excepted the Pueblo (Indian) lands * * *."

In the body of the decision, we find the following pertinent expressions of the court:

> "It is true that the act of December 22, 1858, confirming these lands to the Pueblos, may have been itself void by reason of petitioner's prior title thereto; but that is a question which is not necessarily involved in this case, and upon which we express no opinion. It will occasionally happen that the Government through accident or inadvertence will patent the same land a second time; but when its attention is called to the fact that the land has been previously patented, it cannot patent the same land a second time without virtually stultifying itself. A patent assumes that a patentor has certain rights to convey, and that if those rights have already been conveyed with the knowledge of the grantor, a second patent carries with it a suspicion of a want of good faith."

Said section 14 of the act creating the Court of Private Land Claims was construed in the case of Real de Dolores *v.* U. S., 175 U. S., 75, as follows:

> "We are also of opinion that Sec. 14 of the Act of March 3, 1891, C. 539, 26 Stat. 854, which provides for a personal judgment against the United States in cases where the land decreed to any claimant, under the provisions of the Act, shall have been sold or granted by the United States, applies only to cases where such lands have been sold or granted as public lands, for a consideration which equitably belongs to the owner of the land, and not to cases where the Government has merely released its interest to one apparently holding a good title under a Spanish or Mexican Grant, which subsequently turns out to be invalid by reason of an older or better title. In the one case, there is a moral obligation on the part of the Government to protect the real owner. In the other, there is a mere quit claim of its rights to one who apparently has a better title thereto."

Believing that the two authorities aforesaid, together with the citations therein contained, are conclusive, we will invade the appellee's position, and assume to answer in advance the probable contentions which he will propose.

After the confirmation of the Sonoita grant, as aforesaid, but before issuance of the grant patent, the patentees of lands under homestead laws which were within the boundaries of the grant, sought to have such lands eliminated from the grant patent. The Secretary of the Interior decided this matter on March 26, 1906.

> See Ainsa, Adm'r, *v.* Magee *et al.*, Vol. 34, L. D., 506.

This decision states well and correctly the facts pertaining to this case.

The decision reached by the Honorable Secretary of the Interior in the above case, while being *obiter dicta*, in our judgment, will nevertheless give the plaintiff herein a peg

to stand on. Briefly, it is this: That section 8 of the act creating the Court of Private Land Claims allows a claimant of a perfected grant to file a petition with said court for its confirmation, and in this event, if the claimant sees fit to avail himself of the privilege, he does so at the expense of the condition attached, namely: that if such lands have been disposed of by the United States such lands must be eliminated from his grant.

If, however, the owner of such perfected grant does not avail himself of the privilege, and the United States institutes the suit and forces the claimant into court, then such claimant is not subject to the above condition, and if his grant is confirmed he gets it all, without eliminating any previously patented lands therein contained.

The argument of the Secretary in support of his decision is in effect that any other construction would amount to a violation on the part of the United States of its treaty obligation with Mexico; that a complete grant vested the grantee with absolute title, which the United States could not usurp, as it never could acquire any title, and that in consequence any patent which the United States might give of parts of such grant would be void.

The argument of the Secretary sounds well, and unquestionably it is reasonable and, perhaps, in a certain sense, just. But it deals entirely with the grant claimant's equities. The Secretary puts himself in the shoes of such claimant, and argues merely from his standpoint. Had the Secretary put himself into the shoes of the Government or of the homestead claimant, and argued from their standpoint, his reasonings and decisions might have been different.

The Government and the homestead claimants are in the following position: Without knowledge of any grants, a part of the supposed public land is surveyed and thrown open for settlement; thereupon the Government invites its citizens to go upon such lands, cultivate and improve the same, pay certain fees, and obtain title. This is done by

Mr. Morgan and Mr. Ryan, and in consideration of which the Government gives Mr. Morgan and Mr. Ryan a patent to the lands, the former in 1879 and the latter in 1880. Thereafter the Government ascertained that these very lands belonged to certain third parties under a perfect Mexican grant, a grant which the Government, by treaty with Mexico, agreed to recognize. What is this Government to do in reference to it? Will it grant a patent to the Mexican grant claimant, and thus, in the language of Judge Brown, "virtually stultify itself?" Will it grant the second patent which would carry with it "a suspicion of a want of good faith?" Or will it stand by its action in granting the homestead patent, and recompense the Mexican grant claimant by money instead of land, even if in so doing it violates the treaty referred to?

Let us remember that the error which led the Government into granting the homestead patent was entirely due to the laches of the grant claimant, who remained quiet while the Government surveyed the land and opened it for settlement, and while the hardy pioneers were residing upon it, improving it and paying the Government money for it.

Let us further remember that away back in the year 1854 (10 Stat., 308) the Government made provision by which grant claimants could have the surveyor general of New Mexico, which then included Arizona, inquire into the validity of grants, and that the grantor of the appellee herein waited until the 30th day of December, 1879, nearly 25 years, before filing a petition with the surveyor general for confirmation. This is shown by the admitted facts herein.

As heretofore stated, the decision of the Land Office gives the Court of Private Land Claims Act a strained construction, to make it correspond with the treaty, and draws a distinction between an imperfect and perfect grant, and between cases of complete grants when claimant institutes suit and when the Government institutes the suit.

As a complete answer to the decision of the Secretary of the Interior above referred to, we invite a careful study of the case of Botiller *v.* Dominguez, 130 U. S., 238. Justice Miller rendered the opinion.

Dominguez brought an ejectment proceeding in the California court against Botiller. He alleged ownership of a complete Mexican grant, and showed that Botiller had settled upon a part of it with the idea of homesteading it. No patents had been issued to either parties. The court instructed the jury that the written instruments in evidence showed the grant to be a perfect one at the date of the Hidalgo treaty, and that the title to the grant was therefore vested in the grantees absolutely. The court further instructed the jury that such grant being a perfect one, the claimant was not compelled to submit it to the commissioners appointed by the act of Congress of March 3, 1851, for confirmation, but that the title of claimant could be asserted in any courts of this country. Verdict and judgment was for plaintiff, and an appeal taken to the Supreme Court of the United States, the errors assigned being the above instructions.

Justice Miller prefaces his decision by referring to the importance of the matter, and then says:

> "If the proposition on which the Supreme Court of California decided this case is a sound one, namely, that the board constituted under that Act had no jurisdiction of, and could not by their decree affect in any manner, a title which had been perfected under the laws of the Mexican Government prior to the transfer of the country to the United States, it is impossible to tell to what extent such claims of perfected titles may be presented, even in cases where the property itself has by somebody else been brought before that board and passed upon."

Right here we apply the foregoing argument to the argument of the Secretary of the Interior. If the Secretary is correct, the United States may go on for the next fifty years

patenting land in Arizona to homesteaders, and at the end of that time first learn that a perfected grant existed and the homestead patents thus be void.

Justice Miller then cites in full the said act of Congress of March 3, 1851, a part of section 8, which reads as follows:

> "That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government shall present the same to said Commissioners" * * *

Section 13 of said act provides that all the lands, the claims to which are not so presented within two years, shall be considered a part of the public domain.

Now the California court construed the above sections as referring only to imperfect grants, on the theory that if the section referred to perfect grants, the law would be invalid as in derogation of the treaty. In other words, the California court gave the law a forced construction for the same reason, and upon the same theory, that the Secretary of the Interior gave the Court of Private Land Claims Act a forced construction.

It will be noted that said act of March 3, 1851, referred to "any right or title" derived from the Mexican Government; and that section 14 of the act of March 3, 1891, provides that "if in any case," it appears that a patent has been issued, etc.

It is just as illogical, therefore, to put a strained construction on one as it would be on the other.

Justice Miller, in said Dominguez *v.* Botiller case, comes straight to the point, and says that under the California decision two propositions are involved, viz:

> "The first of these is that the statute itself is invalid, as being in conflict with the provisions of the Treaty with Mexico. The second proposition is, that the statute was not intended to apply to claims which were supported by a complete and perfect title from

the Mexican Government, but on the contrary, only to such as were imperfect."

The first proposition is answered by Judge Miller as follows:

> "With regard to the first of these propositions it may be said that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by the general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican Government, it was a matter of international concern which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States, as a sovereign power, chooses to disregard."

The second proposition, and, according to the court, the most important one, is then considered, viz: Whether the act applied only to imperfect grants or to all grants, whether perfect or imperfect.

> "There is nothing in the language of the statute to imply any such exclusion of perfected claims from the jurisdiction of the commission."

The sections of said act of March 3, 1851, are then cited by Judge Miller, and he adds:

> "In all this there is no hint or attempt at any distinction as to claims to be presented, between those which are perfect and those which are imperfect in their character. On the contrary, the language of the 8th section is as precise and comprehensive as it could well be made, in that it includes every person

> claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government."

These remarks apply perfectly to section 14 of the act of March 3, 1891, for this section provides that "if in any case" lands have been patented the grant claimant must take money instead of such land. Certainly there is here "no hint or attempt at any distinction" between perfect or imperfect grants.

We invite the court's careful study of this Dominguez *v.* Botiller case. From it we learn that the purpose of the Government in forcing the grant claimants to take some action, or lose their grants, is to protect the Government in its public laws and prevent it issuing patents on lands covered by grants.

We come back to the Secretary's views in reference to the Court of Private Land Claims Act, and put that act in the following light:

The United States says to the owner of a perfected grant, You may come into court for confirmation, but you are not obliged to. If you don't come in the Government may force you in. By failing to come in you may lose your right, as the Government, not knowing of your claim, may patent the lands to homesteaders, and in this event you will have to take money in lieu of your land. All of which is perfectly just and equitable.

But even if the decision of the Secretary was not in direct conflict with the reasoning contained in the Botiller *v.* Dominguez case, it would still be found faulty in the face of the fact that Ainsa, after he was brought into court by the Government, did, by way of amended answer, set up his title in full and pray an adjudication of it and ask that he be declared the owner in fee.

Therefore he became an actor; he virtually brought himself within the provisions of the second paragraph of section 8 of the Court of Private Land Claims Act, because he ap-

pealed to the land court for adjudication of his title. His amended answer in the Court of Private Land Claims can only be construed as a cross-complaint, and as such he himself is the party plaintiff.

There would seem to be but one other contention that the appellee in this action might make. This may be stated as follows:

When the United States commenced the action in the Court of Private Land Claims to have the validity of the Sonoita grant inquired into, Richardson (appellant) was made a party defendant and was served with process. He did not appear, however, and by reason of this the plaintiff may argue that he has lost his right to be heard now.

The following facts in this connection are to be noted:

1. That the United States, in its petition, set forth that Richardson owned certain patented lands within the boundary of said grant.

2. In the amended answer of Ainsa, administrator, to said Government petition he states that the parties in possession of the grant as patentees of the United States are wrongfully in possession, and that the patents issued by the Government are void.

3. It follows from the above two facts that the Government alleged the patents to Richardson, and that the grant claimant admitted such patents, but alleged that such patents were void.

We now direct the attention of the court to a case which not only covers this phase of the present litigation, but is conclusive as to the other issues herein, viz:

United States *v.* Martinez, 184 U. S., 441.

The facts follow: Martinez filed a petition in the Court of Private Land Claims to conform his title to the Lobata grant.

In his petition he alleged there were no adverse claimants to any portion thereof. The decree found it was a com-

pleted grant at time of treaty and confirmed it. Thereafter a survey of it was approved and a Government patent was issued for the grant. Six years thereafter Martinez filed a petition with said Court of Private Land Claims, alleging that prior to the confirmation of the grant the United States had issued patents to 2,056 acres to certain individuals, all of which acreage was within the boundaries of his grant. His prayer was for money judgment in lieu of such acreage. Justice Brown, in referring to the matter of making adverse claimants parties, says:

> "The only object of requiring notice to be given to adverse possessors or claimants, is to compel them to show the location and boundaries of their claims, and that they are not mere squatters or trespassers, but hold the land under a grant from the United States, in which case, under section 14, such title from the United States to such other person shall remain valid notwithstanding such decree. If, however, it appear, as it does in the case, that the petitioners admit that the adverse possessors or claimants do hold under grant from the United States, and there are no disputed boundaries, there would appear to be no substantial reason for making them parties, inasmuch as they could not be affected by the decree. The only consequence of an omission to serve on them a copy of the petition is an acknowledgment of their title and of its boundaries."

And after discussing the proposition further, the court says that because

> "the right of the entrymen cannot be affected by the decree, we see no occasion for making them parties."

In the case at bar the Government knew it had patented certain lands to the grantors of Richardson, and the boundaries were fixed. Ainsa, Admr., admitted such to be the case. Richardson's rights, therefore, could not be affected by the decree, and there was no occasion for making him a party.

The court next considers whether the claimants will be allowed money in lieu of the lands after the lapse of seven years. The court says that the patented lands, under section 14 of the Court of Private Land Claims Act, "shall remain valid notwithstanding such decree" and the claimants by a "simple reference to the records of the land office at Sante Fe," could have ascertained the facts. The result is that claimants are construed, not only to have lost the lands, but also the pecuniary judgment which they might have obtained in lieu of the lands, on account of laches.

In view of the fact that the plaintiff herein argues that the decision of the Secretary of the Interior, and the issuance of the patent, creates an estoppel upon the defendant by virtue of the doctrine of *res adjudicata*, it seems necessary to call the court's attention to section 13 of the act creating said Court of Private Land Claims.

We first repeat a part of our prior argument:

Section 6 of said act provides that claimant must file his petition with the court within two years, if grant is imperfect.

Section 8—if grant perfect, claimant may file petition, and if he does not do so, the Government may file it.

Section 13 provides:

> "That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely:
>
> "Fourth. No claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority" (a patent under homestead laws is acted upon under the authority of Congress).
>
> "Fifth. No proceedings, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of

all rights as between the United States and all persons claiming any interest or right in such land.

"Sixth. No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor shall it operate to make the United States in any manner liable in respect of any such grant, claims or lands, or their disposition, otherwise than as is in this act provided."

We believe that the study of the case of United States *v.* Baca, 184 U. S., 653, is in point. The facts follow:

Baca filed a petition in the Court of Private Land Claims for confirmation of the San Jose del Encinal grant. In answer, the United States alleged that said grant lay wholly within lands confirmed by act of Congress to the town of Cebolleta. The court found that said grant was a perfect one at the time of the treaty, but inasmuch as Congress had confirmed the land to the town, the court was without jurisdiction, save to pronounce upon the character of claimant's title, as aforesaid. The Government appealed and Justice Gray decided the matter in the Supreme Court of the United States. After citing section 8 of the Court of Private Land Claims Act, the court says:

> "But all the powers so conferred upon the Court of Private Land Claims are subject to and controlled by section 13, which enacts that all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions, as well as to the other provisions of this act, namely:"

Then follow several provisions, the fourth of which is:

> "No claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority.
>
> "The language of this provision appears to us too clear to be misunderstood or evaded. The manifest intent of Congress appears to have been that with

> any land, the right to which Congress, in the exercise of its lawful discretion, had itself assumed the decision, the Court of Private Land Claims should have nothing to do" (page 659).

The conclusion reached is that the Court of Private Land Claims had no right to determine that the grant was a perfect one at the time of the treaty, but its only authority was to pass upon its jurisdiction, and that it had no jurisdiction.

(c) *That the grantee had a good title and all rights perfected which were necessary to protect his property rights.*

Undoubtedly, if nothing had intervened, the Mexican grant claimant had a good title, and all rights perfected which were necessary to protect his property rights against any one who had *no* rights in the property. But that is not the case here. Others have acquired an interest in the property antagonistic to the Mexican grant claimant. If the Government of the United States had had notice of the boundaries of the Mexican grant claimant's property, or if the grantee from the United States Government had had notice, then, there can be no doubt but that the Mexican claimant would have been entitled to the whole land. But there was no notice, constructive or actual and no means in this country, by which inhabitants of this country could acquire information as to the extent of the Mexican grantee's claims and interests.

Tenants in common own an interest in the whole property. But on a suit in partition, where each is given a full title to a divided part, there can now be no question as to deprivation of property rights. An owner of land may suffer a loss by adverse possession; the law considering that if the original owner is so negligent and cares so little about his land, that he allows another to live there so long as owner, he will be compelled to admit title to be in that adverse possessor. Though in these cases the parties had full title, yet their

title was disarranged and changed. The Mexican grant claimant coming under the jurisdiction of our laws, must submit to them, and there is no reason why, when necessary, he cannot have his title disturbed the same as tenants in common or owners of adversely possessed land.

Granting that it is true that the Mexican claimant had a good title, and all rights perfected which were necessary to protect his property rights in certain instances, still no one but himself knew it, and there was no means of discovering such information. Were others to be deprived of gaining title to the unowned land merely because they did not know of the exact claims of the Mexican grantee? And if, in pursuance of the sound policy of the United States Government, settlers entered upon land in an effort to open up a new country, and prepare for its development, and by misfortune got on land of another, whose interests they could not know, and lived there and cultivated the land for twenty years, then are these settlers to be thrown off and have nothing for their work? At one time, it may well be, the Mexican claimant *had* all the rights necessary, but he failed to *exercise* these rights, and failed to the detriment of others. Aside from the statute, there can be no question as to where the equity lies. And under the statute, the point is fully covered.

(*d*) *That the statute is in derogation of a common-law right.*

This argument virtually admits that the statute does cover the point in issue, and that it is adverse to the interests of the Mexican grant claimants. They then set up that it is in derogation of common-law rights.

Many statutes are in derogation of common-law rights. They are not bad because of that. That the common law is changed in places by statute, shows that occasions arise where the common law is deficient in justice and that the old law should be changed. The increasing complexity of

life and the radical changes in present-day conditions necessitate determination of issues on a different basis than that of centuries ago.

But what is the common-law right? The right to life, liberty and property? If that is the common-law right which has been derogated, it is well to examine how it has been infringed upon. Even at common law, if one had a property right which he failed to exercise for many years and gave no notice of, and others infringed and claimed ownership and acted thereon, and the original claimant allowed them to deal with the right as owners and hold themselves out as such, the original claimant was estopped from asserting ownership. It would have been a fraud otherwise. It would have violated the principles of that equitable rule of "unjust enrichment." So, while one was entitled, as of common right, to enjoy his property, he was still under a duty to others concerning his rights. He was under a duty not to allow others innocently to be injured by his neglect. And it is this rule on which we base our arguments that the statute is not in derogation of any common-law rights (preferably called "natural" rights or "fundamental" rights).

Furthermore, we argue that the statute, instead of being in derogation of any common-law (or natural or fundamental) rights is in reality in furtherance of those rights, and in furtherance of treaty rights. The statute provides a means whereby those rights can be established and recognized and posted for the benefit of all concerned. The statute provides for an adequate means of protecting one's rights in land and for preventing anyone being injured by unknown claims.

Thus we contend that the statute, instead of being in derogation of a common-law right, is in accord with the common law, in that it is, first, directly within a qualification of the broad common-law (or natural or fundamental) right; and, second, it is in furtherance of the claimed right.

Discussion of Cases Cited by Appellee.

The appellee, to sustain his contention in the case at bar in the Arizona Supreme Court, relied largely upon the following decisions of the Supreme Court of the United States, viz.:

Doolan *v.* Carr, 125 U. S., 618.
Newhall *v.* Sanger, 92 U. S., 761.

A cursory examination of these cases would persuade many to believe that they were decisive of this case. A careful study of them, however, shows to the contrary.

We will analyze the Doolan case carefully, as it is by far the strongest case that plaintiff can cite to sustain his contention. The facts systematically arranged are as follows:

Doolan owned a perfect grant, which was confirmed to his grantor by the Mexican Government on May 22, 1840. On February 27, 1852, Doolan petitioned the California commissioners, who were appointed by Congress for the purpose, to confirm his grant. On February 14, 1854, said commissioners did confirm his grant. An appeal was taken to the Supreme Court of the United States, and that court affirmed the action of the commissioners at its December, 1860, term. Thereafter surveys were made by the surveyor general of California of the grant on June 6, 1871. The Secretary of the Interior finally approved of the survey. No patent had yet been issued to Doolan for the grant, however.

It is important to note the above dates carefully. The term SUB-JUDICE, as defined by Rapalje & Lawrence's Law Dictionary, as well as by Bouvier's Law Dictionary, is as follows:

> "SUB-JUDICE.—Under judicial consideration; a matter as yet undetermined."

By referring to the above dates, it will be noticed that on February 27, 1852, Doolan filed his petition with the com-

missioners for confirmation of his grant and from that date until June 6, 1871, when the survey of his grant was finally approved, and thereafter until patent issued, the matter was sub-judice, *i. e.,* it was under judicial consideration and undetermined.

By act of Congress of July 1, 1862, and certain amendments thereto, the Western Pacific Railroad Company was given certain alternate sections of land. Patents were issued for such lands to the railroad on February 28, 1874. The section in controversy was one of these and was within the boundaries of the Doolan grant. Carr bought the said section from the railroad. The said grant of lands to the railroad company was subject to the condition that if the United States had sold any of the land or reserved any of it for any purpose, the railroad could not get it, but could get other lands in lieu thereof.

The decision of the court is that land within the limits of a valid Mexican grant, *which grant was sub-judice* when the gift of the part of it was made to the railroad, did not pass the land to the railroad, and that the patent to the railroad was therefore void because the officers of the Land Office had no authority to make the patent.

Undoubtedly this is good law. The Supreme Court has confirmed a land grant, and the Secretary has approved the survey thereof. Before a patent was issued to the grant, but after the said confirmation and approval of survey, the Land Office attempted to patent part of the grant to a railroad under a law which prohibited the Land Office from giving to the railroad any land which the United States had patented or reserved for other purposes. Naturally and very correctly the court decided that the patent to the railroad was void.

There is a radical difference between the Doolan case above referred to and the one at bar, both as regards the law and the equities.

In the first place the Doolan case was decided by the Supreme Court of the United States on the 21st day of No-

vember, 1887, or four years prior to the adoption by Congress of the Court of Private Land Claims Act.

Therefore, we ask what the decision would have been had the case been under the Court of Private Land Claims Act, and had the patent to the railroad been issued before action was taken in that court to test the validity of the grant. Then for the first time the Supreme Court of the United States would come face to face with section 14 of the Court of Private Land Claims Act, providing, "That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act" (and they may be decreed to claimant under the act whether the claimant institutes the suit or the Government institutes it) "shall have been sold or granted by the United States to such other person, such title from the United States to such other person shall remain valid," etc.

Therefore the law in the case at bar is different from the law applied in the Doolan case, and we submit that the facts are also different. As shown in the decision of the Secretary of the Interior in this matter (34 L. D., 506), as well as by the other evidence herein, the United States had surveyed the land in dispute and invited its citizens to homestead it long prior to any action whatsoever being instituted by the appellee or his grantors looking towards obtaining a confirmation of his grant.

The patent to Wm. Morgan was dated December 13, 1879. It was seventeen days thereafter, to wit, on December 30, 1879, that the appellee's grantor first brought the attention of his grant to the surveyor general of Arizona. Therefore, at the time said patent was issued, the grant was not *sub-judice*, because it was not "under judicial consideration."

The second homestead patent at issue, namely, the Ryan one, was dated September 1, 1880, which conclusively shows that Ryan's right thereto was instituted by a proper filing

upon the land long prior to the grant claimant's application for confirmation to the said surveyor general.

The facts and decisions in the case of Newhall *v.* Sanger are distinguished in like manner as the Doolan case. This was decided by the Supreme Court in its October term, 1875, or sixteen years prior to the passage of the Court of Private Land Claims Act.

The appellee in the court below strenuously urged that the Supreme Court of the United States had repeatedly held that patents for lands which had been previously granted, reserved from sale or appropriated are void.

This is admitted by the appellant Richardson. But in none of the cases cited by appellee below to prove such admitted contention was the construction of the Court of Private Land Claims Act in issue.

Appellee cited in the court below the case of Cameron *v.* U. S., 148 U. S., 301, as directly in point and conclusive.

An examination of this case conclusively shows it to be absolutely foreign to this case at bar. It was an action to compel the removal of fences from the public lands placed thereon by Cameron. Cameron justified, claiming to own the land as a Mexican grant. It appeared that the surveyor general of Arizona had recommended the confirmation of the grant to him. The Supreme Court held Cameron to have color of title, and dismissed the action.

The case of Reynegan *v.* Bolton, 95 U. S., 33, is also relied upon by appellee.

It is sufficient to say of this case that it was decided in 1877, long prior to the passage of the Court of Private Land Claims Act.

In conclusion, the only authority which appellee can refer to as being at all in point, and the sole authority for the decision of the Arizona Supreme Court, is the decision of the Secretary of the Interior (34 L. D., 506). In it the Secretary holds, as already shown in this brief, that section 14, providing that—

> "If in any case it shall appear that the lands or any part thereof decreed to any claimant under the provision of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid," etc.,

does not mean "in any case," but only means in cases when the grant is imperfect or when claimant institutes the action in the Court of Private Land Claims himself; and this notwithstanding the provisions in the third paragraph of section 8 of the Court of Private Land Claims Act, providing for the institution of the suit by the Government, and in which event the said act recites that

> "the court shall * * * proceed to hear, try and determine the question stated in such petition" (the petition filed by the United States) "or arising in the matter, and determine the matter according to law, justice, and the provisions of this act, but subject to all lawful rights adverse to such claimant and possessor, and subject in this respect to all the provisions of this section applicable thereto."

To offset this decision of the Secretary holding that the words "if in any case" does not mean perfect grants when the Government starts the suit, we present, as aforesaid, the case of Botiller *v.* Dominguez, 130 U. S., 238, holding the statute reading

> "and all lands the claims to which have not been presented to said commissioners within two years * * *; shall be deemed * * * part of the public domain"

means all grants whether perfect or imperfect.

The defendant R. R. Richardson is entitled to a reversal of the judgment of the lower court, and for judgment quieting his title to the Morgan and Ryan properties.

Respectfully submitted,

S. L. KINGAN,
Attorney for Appellant.

EXHIBIT A.

SEC. 6. That it shall and may be lawful for any person or persons or corporation, or their legal representatives claiming lands within the limits of the territory derived by the United States from the Republic of Mexico and now embraced within the territories of New Mexico, Arizona, or Utah, or within the states of Nevada, Colorado, or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of this act have not been confirmed by the act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition in writing, to the said court in the state or territory where said land is situated and where the said court holds its sessions, but cases arising in the states and territories in which the court does not hold regular sessions may be instituted at such place as may be designated by the rules of the court.

The petition shall set forth fully the nature of their claims to the lands and particularly state the date and form of the grant, concession, warrant, or order of survey under which they claim, by whom made, the name or names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioner; and also the quantity of land claimed and the boundaries thereof, where situate, with a map showing the same, as near as may be, and whether the said claim has heretofore been confirmed, considered or acted upon by Congress or the authorities of the United States, or been heretofore submitted to any authorities constituted by law for the adjustment of land titles within the limits of the said territory so acquired, and by them reported on unfavorably, or recommended for confirmation, or authorized to be surveyed or not; and pray in such petition that the validity of such title or claim may be inquired into and decided.

And the said court is hereby authorized and required to take and exercise jurisdiction of all cases or claims presented by petition in conformity with the provisions of this act, and to hear and determine the same, as in this act provided,

on the petition and proofs in case no answer or answers be filed or persons interested in preventing any claim from being established, and the answer of the attorney for the United States where he may have filed an answer, and such testimony and proofs as may be taken; and a copy of such petition, with a citation to any adverse possessor or claimant shall immediately after the filing of the same, be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper state or territory, and in like manner on the attorney for the United States; and it shall be the duty of the attorney for the United States, as also any adverse possessor or claimant, after service of petition and citation as hereinbefore provided, within thirty days, unless further time shall, for good cause shown, be granted by the court, or a judge thereof, to enter an appearance and plead, answer or demur to said petition; and in default of such plea, answer, or demurrer being made within said thirty days, or within the further time which may have been granted as aforesaid, the court shall proceed to hear the cause on the petition and proofs, and render a final decree according to the provisions of this act, and in no case shall a decree be entered otherwise than upon full legal proof and hearing; and in every case the court shall require the petition to be sustained by satisfactory proofs, whether an answer or plea shall have been filed or not.

SEC. 8. That any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican Government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try and determine the validity of the same and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned.

If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or

claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby.

It shall be lawful for and the duty of the head of the Department of Justice whenever in his opinion the public interest or the rights of any claimant shall require it, to cause the attorney of the United States in said court to file in said court a petition against the holder or possessor of any claim or land in any of the states or territories mentioned in this act who shall not have voluntarily come in under the provisions of this act, stating in substance that the title of such holder or possessor is open to question, or stating in substance that the boundaries of any such land, the claimant or possessor to or of which has not brought the matter into court, are open to question, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudicated; and thereupon the court shall, on such notice to such claimant or possessor as it shall deem reasonable, proceed to hear, try and determine the questions stated in such petition or arising in the matter, and determine the matter according to law, justice and the provisions of this act, but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the provisions of this section applicable thereto.

SEC. 13. That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions, as well as to the other provisions of this act, namely:

First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the states of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound upon the prin-

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 199.

R. R. RICHARDSON, APPELLANT,

vs.

SANTIAGO AINSA, ADMINISTRATOR, WITH WILL ANNEXED, OF THE ESTATE OF FRANK ELY, DECEASED, APPELLEE.

BRIEF FOR SANTIAGO AINSA, ADMINISTRATOR, ETC., APPELLEE.

Statement of the Case.

This is a suit to quiet title to the Rancho San José de Sonoita, a Mexican land grant, confirmed by the United States Court of Private Land Claims, as against R. R. Richardson and others, who claim title to a part of the lands, under patents issued under the United States homestead laws, prior to the decree of confirmation.

The suit was commenced by Frank Ely against the New Mexico and Arizona Railroad Company and others by complaint filed June 24, 1887 (Transcript, p. 2). Demurrer to this complaint was sustained; the Supreme Court of Ari-

zona affirmed this judgment (2 Ariz., p. 420); the Supreme Court of the United States reversed the judgment of the Territorial court, directed the overruling of the demurrer and remanded the case (Ely *vs.* N. M. & A. R. R. Co., 129 U. S., pp. 291, 294). Thereafter the case was tried by the district court on the merits, and on June 6, 1893, that court rendered its judgment dismissing the complaint on the ground that it had no jurisdiction. From this judgment appeal was taken to the Supreme Court of Arizona. Ely in the meantime died, and Ainsa, his administrator, was substituted as plaintiff. The Supreme Court of Arizona affirmed the judgment of the lower court (36 Pac., pp. 213, 214), and Ainsa appealed to the Supreme Court of the United States. That court reversed the judgment of the Territorial courts and remanded the case for trial, holding that the district court had jurisdiction (175 U. S., pp. 76-91; Transcript, p. 8, fols. 20-21).

At the April term, 1907, the case was tried a second time before the district court. An amended complaint was by leave of court filed by Ainsa, administrator, in which the New Mexico and Arizona Railroad Company was eliminated as a defendant and the title of the case changed to Ainsa, administrator, etc., against R. R. Richardson and others.

Upon this trial judgment was rendered in favor of Ainsa, administrator, and against the defendants. From this judgment Richardson appealed to the Supreme Court of Arizona. That court affirmed the judgment of the lower court (Transcript, pp. 34-37). And from this last judgment Richardson has appealed to this honorable court.

While the suit was pending before the Territorial courts, to wit, on October 19, 1892, the United States filed its petition in the United States Court of Private Land Claims against Ainsa, administrator of Ely's estate, R. R. Richardson and others, as defendants, wherein it prayed, among other things, that Ainsa, administrator, be ruled to produce the title papers upon which he based his claims to said San

José de Sonoita grant; that defendant Richardson and the other defendants be ruled to disclose to the court their muniments of title, and that the title to said lands be settled and adjudicated, etc. (Transcript, pp. 14-16).

Ainsa, as administrator, filed his answer to the suit, setting forth his title. The Court of Private Land Claims upon the hearing decreed the grant to be invalid. Appeal from this decree was taken by Ainsa to this honorable court. On this appeal this court reversed the decree of the Court of Private Land Claims, and directed the grant to be confirmed (Ely's Adm's *vs.* U. S., 171 U. S., 220). Thereafter and on the 6th of April, 1902, the United States Court of Private Land Claims rendered its decree in said case, in accordance with the judgment of this court, wherein it did adjudge, among other things, that said San José de Sonoita grant—

> "constituted a valid title lawfully and regularly de-
> "rived from the government of Mexico, and that
> "said title was perfect and complete at the date of
> "the acquisition of the Territory by the United
> "States * * * such a valid title that the United
> "States are bound upon the principles of the public
> "law and by the provisions of the treaty of cession to
> "respect it as valid, complete and perfect at said
> "date,"

and did decree the confirmation of the title of said grant to Leon Herreros (the original grantee from the Mexican government), his heirs, successors in interest and assigns, and the bill of the United States to all the lands so confirmed was dismissed (Transcript, pp. 22-25).

The grant as confirmed was surveyed. Upon the hearing of the matter of the approval of the survey the Court of Private Land Claims was asked to exclude certain of the lands covered by homestead patents; this petition was denied, and the survey of the grant, being found substantially to conform to the decree of confirmation, was approved by the Court of Private Land Claims, and such approval was

endorsed on the plat of the survey and returned to the Commissioner of the General Land Office (Transcript, pp. 25-26, fols. 63-64). Thereafter and on October 9, 1906, a patent to the grant as confirmed and surveyed was issued by the President (Transcript, pp. 13-14).

It was agreed that Ainsa, administrator, was the owner in fee of the grant title, and that defendant Richardson claimed title to certain parts of the lands within the limits of the grant under patents issued, respectively, on December 13, 1879, and September 1, 1880, under the United States public land laws (Transcript, p. 12, fols. 31-32).

The questions presented are (1) whether or not the district court had jurisdiction over the subject-matter of the action; (2) whether or not, under the provisions of the act of Congress creating the Court of Private Land Claims (26 Stat. at Large, 854, 862), the lands, for which patents under the public land laws were issued to Richardson's grantors, were excluded from the grant as confirmed, notwithstanding the refusal of the United States Court of Private Land Claims to exclude the same.

The district court and the Supreme Court of Arizona on appeal held (1) that the court had jurisdiction, that point having been settled by the judgment of this honorable court on the second appeal (175 U. S., pp. 76, 91); (2) that the lands for which patents under the United States public land laws had been issued were not excluded from the grant by virtue of the provisions of said act of Congress.

Points and Authorities.

I.

This court having heretofore decided on appeal in this case (Ainsa, Adm'r of Ely, *vs.* New Mexico & Arizona Railroad Company *et al.*, 175 U. S., 76-91) that the district court

had jurisdiction of this action, that question is settled and cannot be raised again.

United States *vs.* Camou, 184 U. S., 572-574.

Illinois *ex rel.* Hunt *vs.* Illinois C. R. Co., 184 U. S., 77-99.

Sidbald *vs.* U. S., 12 Pet., 488-492.

Thompson *vs.* Maxwell Land Grant & R. Co., 168 U. S., 451-471.

Snyder *et al. vs.* Pima County, 6 Ariz., 41-47.

II.

The San José de Sonoita grant, being a complete and perfect grant prior to the treaty of cession, the grantee thereof, his heirs and assigns, had title in fee, which was not in any way affected by the change of sovereignty.

United States *vs.* Percheman, 7 Pet., 86-87.

Ainsa *vs.* New Mexico & Arizona R. R. Co., 175 U. S., 76-91.

Dent *vs.* Emmeger, 14 Wall., 308-314.

Trenier *vs.* Stewart, 101 U. S., 797-810.

And the treaty of cession, commonly called the Gadsden Treaty, so provides.

Ely *vs.* United States, 171 U. S., 220-241.

III.

The lands embraced within the grant being private property the patents issued to parts thereof under the United States public land laws were utterly void.

Knight *vs.* United Land Ass'n, 142 U. S., 161-216.

Polk *vs.* Wendell, 9 Cranch, 87-102.

The President of the United States has no right to issue patents for land the sale of which is not authorized by law.

Easton *vs.* Salisbury, 21 How. (U. S.), 426-432.

IV.

Under the act of Congress approved July 22, 1854 (10 Statutes at Large, p. 308), and the act of Congress approved July 15, 1870 (16 Statutes at Large, 304), the lands within the limits of the said grant were reserved from sale or other disposal by the Government.

34 Land Decisions, 506-517.

While so reserved the homestead patents under which Richardson claims title were issued. Patents for lands reserved from sale are void.

Burfenning *vs.* Chicago, etc., R. R. Co., 163 U. S., 321-325.
Morton *vs.* Nebraska, 21 Wall., 660-675.
Polk *vs.* Wendell, 9 Cranch, 87-102.
Minter *vs.* Crommelin, 18 How. (U. S.), 87-89.
Doolan *vs.* Carr, 125 U. S., 618-642.
Noble *vs.* Union River R. Co., 147 U. S., 165, 176.

Lands within the limits of a claimed Mexican grant in Arizona, being reserved from sale or disposal by the acts of Congress aforesaid, are not "public lands" of the United States, and are not subject to sale under the public land acts.

Cameron *vs.* United States, 148 U. S., 301-311.
Van Reynegan *vs.* Bolton, 95 U. S., 33-37.
Newell *vs.* Sanger, 92 U. S., 761-766.

Under the acts of Congress aforesaid the reservation became immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession.

Opinion of the Secretary of the Interior, 30 Land Decisions, 97-105.

V.

The act of Congress creating the Court of Private Land Claims does not deprive the owner of a perfect grant, who is brought into that court as a party defendant at the suit of the Government, of lands which previously had been unlawfully and without right patented to others under the public land laws, and such lands are not excluded by the terms of that act from the grant as confirmed by that court.

Ely's Administrator *vs.* Magee *et al.*, 34 Land Decisions, 506-517.

Richardson *vs.* Ainsa, 95 Pac. Rep. (Ariz.), 103-105.

ARGUMENT.

The Question of Jurisdiction.

The record in this case discloses the fact that upon a previous trial of this case the district court held that it had no jurisdiction of the cause and dismissed the complaint; that from this judgment an appeal was taken to the Supreme Court of Arizona, which affirmed the judgment of the lower court; an appeal was taken from this judgment to the Supreme Court of the United States; this court reversed the judgment of the Supreme Court of Arizona, holding that the district court had jurisdiction, and sent the case back for trial (Ainsa, Administrator of Ely, *vs.* New Mexico & Arizona Railroad Company and others, 175 U. S., 76, 91).

As this honorable court, in this particular case, has held that the lower court had jurisdiction, that question is forever settled; it is the law of this case and is not subject to consideration or review again.

On this subject this court has said:

> "It is the settled law of this court that, after a case has been brought here and decided, and a mandate

issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation."

United States *vs.* Camou, 184 U. S., 572-574.

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. * * * After a mandate, no rehearing will be granted, * * * and on a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate."

Illinois *ex rel.* Hunt *vs.* Illinois C. R. Co., 184 U. S., 77-91.
Sidbald *vs.* United States, 12 Pet., 488-492.

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case."

Thompson *vs.* Maxwell Land Grant & R. Co., 168 U. S., 451-471, and cases cited in the opinion.

In that case the court further held that it took judicial notice of its own opinions.

As this court, in this case, has already reversed the courts of Arizona on this question of jurisdiction, and held that the district court had jurisdiction and remanded the case for

trial, this question of jurisdiction cannot be inquired into again.

If the question were not *res adjudicata* and this court could look into the record, it would there find that appellant did not interpose any demurrer or other objection to the jurisdiction of the trial court upon the last trial of this case, when the trial court did have jurisdiction to determine actions to quiet title to a Mexican grant. The plaintiff filed an amended complaint during the trial, and by stipulation the answer of defendant, Richardson, was construed as answering said amended complaint (Transcript, p. 8, fol. 21).

It is beyond question that the lower court had jurisdiction of the subject-matter and of the person of defendant (appellant) at the time the amended complaint was filed. In his answer to this amended complaint appellant does not in any form question the jurisdiction of the court. He did not demur to the jurisdiction; he did not object to the filing of the amended complaint, but answered to the merits. The lower court, therefore, at the trial and on the day it rendered its judgment, to wit, September 28, 1907, had jurisdiction of the subject-matter and of the person of appellant.

Appellant's Patents Are Void.

The record in this case discloses that on May 15, 1825, the Mexican government granted to Leon Herreras by letters patent the lands in question; that Ely at the time of his death was the owner of the grant through mesne conveyances from said Leon Herreras, and that Ainsa, administrator, since the death of Ely, has been the owner in fee of said grant, and was such owner at the time of the trial.

Transcript, p. 12, fol. 32.

The title acquired by Leon Herreras from the government of Mexico in 1825 was an absolute and unconditional title in fee.

The United States Court of Private Land Claims, in its decree confirming this title, says:

> "That at the trial of this cause the answer of defendant, Santiago Ainsa, administrator of the estate of Frank Ely, deceased, was sustained by legal and satisfactory proofs, and it was also shown that said grant and sale of the tract herein described, constituted a valid title lawfully and regularly derived from the government of Mexico, and that the said title was perfect and complete at the date of acquisition of the territory by the United States, and that said grant and sale to said grantee, Don Leon Herreras, constitutes such a valid title that the United States are bound upon the principles of the public law and by the provisions of the treaty of cession to respect it as a valid, complete and perfect title at said date."
>
> Transcript, p. 23, fol. 58.

The Gadsden Treaty, under which the sovereignty over the lands south of the Gila river, and including the lands in controversy, was transferred by Mexico to the United States, did not deprive the individual of land or personal property owned by him within the ceded territory. Leon Herreras, since May 25, 1825, was the owner in fee of the San José de Sonoita grant; he or his grantees were such owners in 1854, when, by the Gadsden Treaty, the sovereignty over the territory was ceded by Mexico to the United States, and he or his grantees have been the owners in fee of those lands since the treaty.

Says Chief Justice Marshall:

> "A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory

by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

U. S. *vs.* Percheman, 7 Pet., 86-87.
Ainsa *vs.* N. M. & A. R. Co., 175 U. S., 76-91.

The Gadsden Treaty by its terms provides that the rights to private property within the ceded territory should be protected.

"This Government promised to inviolably respect the property of Mexicans."

Ely *vs.* U. S., 171 U. S., 220-221.

So that by the law of nations and under the provisions of the treaty of cession the rights of Leon Herreras and his grantees to the lands so patented to him by Mexico in 1825 were not altered, changed, or diminished when the sovereignty changed to the United States.

Dent *vs.* Emmeger, 14 Wall., 308-314.
Trenier *vs.* Stewart, 101 U. S., 797-810.

Before the Gadsden Treaty the Rancho San José de Sonoita was private property, held in private ownership under a patent from the sovereign state of Mexico, and after the treaty it remained private property, and such it is today. The title to the Sonoita grant never was in the United States. The lands within the limits of that grant never were public lands of the United States. And the homestead pre-emption, and desert land laws, which apply to the "public lands" of the United States, never applied to the Sonoita grant.

The land officers of the United States, however, in violation of the laws of the United States and of the rights of Leon Herreras and his grantees, permitted pre-emption entries to be made within the boundaries of the grant, and thereafter, and on December 13, 1879, a homestead patent

to one hundred and sixty (160) acres thereof was unlawfully issued to William Morgan, and on September 1, 1880, a homestead patent was unlawfully issued to one hundred and sixty (160) acres thereof to Cornelius Ryan. Defendant, Richardson, as grantee of Morgan and Ryan, claims his title under and by virtue of these two homestead patents.

These patents are void, because the United States never had title to the land. It never had anything to convey. They are also void for the reason that the officers who executed the patents had no authority to do so. The power given to the President to issue patents to public lands of the United States under the public land laws does not authorize him to issue patents to private lands, or any lands except public lands of the United States.

In the case of Knight *vs.* United Land Ass'n, 142 U. S., 161-216, this court said:

> "Ever since the decision in Polk *vs.* Wendell, 13 U. S., 9 Cranch, 87, it has been the settled law of this court that a patent is void at law if the grantor state had no title to the premises embraced in it, or if the officer who issued the patent had no authority so to do, and that the want of such title or authority can be shown in an action at law."

In Easton *vs.* Salisbury, 21 How. (U. S.), 426-432, this court says:

> "The President of the United States has no right to issue patents for land for sale of which is not authorized by law."

Therefore, as the Sonoita grant was a complete and perfect grant at the time of the Gadsden Treaty; as the lands embraced therein were private property, protected by the law of nations and by the treaty, the title to these lands never vested in the United States, and a deed or patent from the United States conveyed no title, and the patents issued to Morgan and Ryan were void.

Patents also void because the lands, by act of Congress, were reserved from sale or other disposal by its officers.

Another reason why the homestead patents issued to Morgan and Ryan were void is that by act of Congress these lands were specifically reserved from sale or other disposal by the officers of the Government.

Provision was made by act of Congress of the United States, approved July 22, 1854 (10 Stat. at Large, p. 308), for the adjustment of land claims within the Territory of New Mexico, which made it the duty of the Surveyor General of New Mexico, which then included Arizona, to ascertain, under instructions from the Secretary of the Interior, the origin, nature, character, and extent of all claims to lands under laws, usages, and customs of Spain and Mexico originating before the cession of the Territory to the United States; that his report should "be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants," and that "until the final action of Congress on such claims, all lands covered thereby should be reserved from sale or other disposal by the Government."

The same powers and duties were conferred upon the Surveyor General of Arizona by the act of July 15, 1870 (16 Stats. at Large, 304; 34 L. D., p. 56).

The lands within the limits of the Sonoita grant, therefore, were, under the acts of Congress just cited, "reserved from sale or other disposal by the Government." Had the grant been imperfect or even void, nevertheless the lands, by act of Congress, were reserved from sale or disposal by the officers of the Government.

But the officers of the Government did, while these lands were so reserved from sale or other disposal, execute homestead patents to William Morgan and Cornelius Ryan. So, the question arises, whether or not these homestead or pre-

emption patents to lands reserved by law from sale or other disposal are valid.

This honorable court and the Secretary of the Interior have repeatedly held that such patents are utterly void.

In the case of Burfenning *vs.* Chicago, etc., R. Co., 163 U. S., 321-325, this court says:

> "But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating to a patent, transfer no title and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

In the case of Morton *vs.* Nebraska, 21 Wall., 660-675, this court said:

> "It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale or appropriated are void. The executive officers have no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."
>
> Polk *vs.* Wendell, 9 Cranch, 87-102.
> Minter *vs.* Crommelin, 18 How., 87-89.
> Doolan *vs.* Carr, 125 U. S., 618-642.
> Noble *vs.* Union River R. Co., 14 U. S., 165-176.

This court has specifically held that the lands included within the limits of a claimed Mexican grant in Arizona, being reserved from sale or disposal by the acts of Congress above cited, are not "public lands" of the United States, and

are not subject to sale under the acts of Congress respecting the disposition of public lands.

Cameron *vs.* U. S., 148 U. S., 301.
Van Reynegan *vs.* Bolton, 95 U. S., 33-37.
Newell *vs.* Sanger, 92 U. S., 761-766.

This very point has been carefully considered and decided by the Secretary of the Interior in Baca Float No. Three, 30 Land Decisions, pp. 97-105, decided June 30, 1900. In this decision the Secretary says:

> "The matters for investigation and report by the Surveyor General were Spanish or Mexican claims to lands, and the reservation for the benefit of such claims was to embrace 'all lands covered thereby.' There is nothing in the act indicative of a purpose on the part of Congress to postpone the effective operation of the reservation in any case to the time of the filing with the Surveyor General of a petition for the confirmation of the claim, or to any other time. Indeed, there is no provision requiring the filing of any such petition with the Surveyor General or elsewhere. The natural and most reasonable interpretation of the language of the statute is that the reservation was to become immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession. The purpose being that the lands should be reserved until final action could be had on the claim, it is quite as necessary that the reservation should be effective for such purpose before as after the commencement of proceedings under the statute by the Surveyor General. Otherwise the lands might have been disposed of by the Government before the commencement of such proceedings and thus the very object of the statute would have been defeated.
>
> "It mattered not whether the claim was a valid one. If the lands were covered by a Spanish or Mexican claim they were to be reserved for the very purpose of affording an opportunity of investigating and determining the validity or invalidity of the claim.

> This investigation was to be made in the first instance by the Surveyor General, but the action of that officer was not to be final. His report was to be submitted to Congress and there the means of final action were to be provided. To fully meet the purpose of the reservation it was necessary that it should at once become operative whenever and wherever lands were covered by a claim such as the statute describes."

Therefore, under the acts of Congress referred to, the lands within the limits of the Sonoita grant were reserved from sale or other disposal ever since 1854. The patents to the land claimed by defendant, Richardson, were issued by the land officers in direct violation of a positive legislative inhibition, and, for that reason also, are utterly void and convey no title.

The act creating the Court of Private Land Claims does not validate these void patents.

The patents under which defendant claims title being void, the only remaining question is whether or not these patents have been validated by act of Congress of March 3, 1891, creating the Court of Private Land Claims, and whether by virtue of that act his lands are excluded from the Sonoita grant, as confirmed by that court.

This brings us to a consideration of the act of Congress creating the Court of Private Land Claims. The act is set forth in Federal Statutes, Annotated, vol. 6, p. 48 *et seq.*; also 26 Stat. at Large, 854-862.

Section 6 of the act authorizes the claimant of any grant "not already complete and perfect" to present his petition for the examination and confirmation of said grant.

An imperfect grant is one which requires a further exercise of the granting power to pass the fee to the land.

As the Sonoita grant was a perfect grant, as the fee had absolutely passed to Leon Herreras, the original grantee,

under the title papers he received from the Mexican government, section 6 of the act is not applicable to the Sonoita grant.

Section 8 of the act gives the right and option to the claimant of a complete and perfect grant to apply to the court for a confirmation of such title. He may do so if he so wishes, but he is not required to do so. If he does so, then he submits to the following condition imposed by the act, namely, if the "title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States."

If he is unwilling to submit to this condition, then he must not file his petition for confirmation.

Ainsa, administrator, was not willing to submit to this condition, and he, therefore, did not file any petition before the land court.

Section 8 further provides for a third class of claimants, namely, the claimant of a perfect grant who does not voluntarily come in under the provisions of the act. As to him the act provides:

> "It shall be lawful for and the duty of the head of the Department of Justice, whenever in his opinion the public interest or the rights of any claimant shall require it, to cause the attorney of the United States in said court to file in said court a petition against the holder or possessor of any claim or land in any of the States or Territories mentioned in this act who shall not have voluntarily come in under the provisions of this act, stating in substance that the title of such holder, or possessor is open to question, or stating in substance that the boundaries of any such land, the claimant or possessor to or of which has not brought the matter into court, are open to question, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudicated; and thereupon the court shall, on

such notice to such claimant or possessor as it shall deem reasonable, proceed to hear, try and determine the questions stated in such petition or arising in the matter, and determine the matter according to law, justice and the provisions of this act, but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant and possessor, and subject in this respect to all the provisions of this section applicable thereto."

As to this third class of grant claimants, the land court must determine the questions stated in the petition of the United States or arising in the matter, and determine the same according to law, justice, and the provisions of the act, with only one limitation, namely: "Subject to all lawful rights adverse to such claimant or possessor as between such claimant and possessor and any other claimant or possessor." So that, under this section as to the third class of grant claimants, the Court of Private Land Claims has simply power to determine whether the title claimed is valid or not and to settle the boundaries thereof.

It will be observed that the provision of the first part of section 8 to the effect that a grant claimant voluntarily coming into court, whose grant is confirmed, shall have excluded therefrom "any part of such land that shall have been disposed of by the United States," does not apply and is not applicable to the grant claimant who is forced into court to answer the petition filed by the Government itself. Congress evidently recognized that it had no power to sell lands held under a complete grant, to which the title had been vested in fee under patent issued by the former sovereign, and therefore did not attempt to deprive such claimant of any part of his lands when such claimant was brought unwillingly into court. Any such provision would have been a violation of the treaty made between the United States and

Mexico, wherein and whereby our Government agreed to recognize and protect private rights to private property.

Ainsa *vs.* N. M. & A. R. Co., 175 U. S., 76-91.

If the claimant of a perfect grant filed his petition for confirmation he did so subject to certain conditions, one of which was that if his title be confirmed such confirmation should exclude any part of the lands previously disposed of by the United States. If he was not willing to have such land excluded he need not file his petition. Such was the position of Ainsa, administrator; he was not willing that his lands previously sold, or attempted to be sold, by officers of the United States should be excluded from his grant, and, therefore, he did not file a petition for confirmation before the Court of Private Land Claims. That he did not come into that court voluntarily has been decided by the Secretary of the Interior when this precise question was before him (Ely's Administrator *vs.* MacKee, 34 L. D., 506-17), and was so found as a fact by the Court of Private Land Claims, as set forth in its decree of confirmation, as follows:

> "That the defendant, Santiago Ainsa, administrator of the estate of Frank Ely, deceased, did not institute this suit, but was brought into court upon petition of the United States under the provisions of section eight of the act of March 3rd, 1891, creating this court and defining its jurisdiction and powers."
>
> Transcript, p. 23, fol. 59.

We therefore submit that under section 8 of the act no land could be excluded from the confirmation of a perfect grant when the United States itself brought the claimant into court to test the validity of his title, and no land was or could be excluded from the confirmation of the Sonoita grant.

The only other sections of the act bearing upon the point at issue are sections 13 and 14.

Section 13 provides—

> "that all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this ct, namely, * * *
>
> "Fourth. No claim shall be allowed for any land the right to which has heretofore been lawfully acted upon and decided by Congress, or under its authority."

No claim for the Sonoita grant or any part of it has hitherto been lawfully acted upon or decided by Congress or under its authority.

The act of the officers of the Government in selling or disposing of the land, being in direct violation of the act of Congress reserving the same from sale or disposal, was, therefore, an act not under the authority of Congress, but in direct violation of its authority, and section 13 does not apply to the case at bar.

This brings us to a consideration of section 14 of the act upon which appellant relies. It is as follows:

> "That if in any case it shall appear that the lands or any part thereof decree to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the Treasury of the United States. Either party deeming himself aggrieved by such judgment may appeal in the same manner as provided herein in cases of confirmation of a Spanish or Mexican grant. For

the purpose of ascertaining the value and amount of such lands, surveys may be ordered by the court, and proof taken before the court, or by a commission appointed for that purpose by the court."

The words in this section, "that if in any case it shall appear," clearly refers to any case before the Court of Private Land Claims, and not to any case in any court whatsoever. For the section further provides that when it does appear that any of the lands decreed to any claimant under the provisions of said act have been sold or granted by the United States, such court shall render judgment in favor of such claimant and against the United States for the reasonable value of the lands so sold, not exceeding one dollar and twenty-five cents per acre, such court clearly meaning the Court of Private Land Claims. The section further provides that appeal may be taken from such judgment to the Supreme Court of the United States, showing again clearly that the section refers only to cases before the Court of Private Land Claims.

Appellant contends that this section means that if in any case, *in any court whatsoever*, it should at any time appear that lands within the limits of confirmed grant had previously been sold or granted by the United States to any other person, such title from the United States shall remain valid, and such court, whether a State or Territorial court, shall render judgment against the United States for the reasonable value of the lands so sold, from which judgment an appeal will lie to the Supreme Court of the United States. Such a construction is manifestly absurd.

Not only does section 14 apply only to cases before the Court of Private Land Claims, but also only to those particular cases before that court where the lands are "*decreed to any claimant under the provisions of this act.*"

The words "decreed to him under the provisions of this act" do not refer to a perfect grant. If the grant is perfect

no lands are decreed to the claimant. The court simply finds and decrees that the grant is perfect, and that the United States has no title. The lands are not decreed to the claimant. They are his without any decree; his because the former sovereign has granted them to him in fee. The language of the act only applies to imperfect grants, where it is necessary for the Government, in order to perfect an incomplete and inchoate right, to deed the fee to the claimant.

Section 8 provides that where the United States files its petition against the claimant of a perfect grant it shall pray "that the title to any such land or boundaries thereof, if the title be admitted, be settled and adjudicated," and that the court shall "hear, try, and determine the questions stated in such petition, or arising in the matter, according to law, justice, and the provisions of this act."

The court must determine and adjudicate the title or the boundaries or both, but it does not decree any land to the claimant. It is his. He has a grant, a patent, from the former sovereign; no lands are decreed to him, only his title and the boundaries are adjudicated.

Therefore section 14 does not apply to him.

This very question has received most careful consideration by the Secretary of the Interior when the defendants in this case sought to have their lands excluded from the patent which was issued to Ainsa for this grant, being the patent that is in evidence in this case.

In his decision (34 L. D., p. 506) the Secretary, among other things, said:

> "From the well-established principles so lucidly stated and applied in that case, we are led to the inquiry whether there is any provision in the act of March 3, 1891, that requires the owner of a complete and perfect title to recognize, without his consent, the title of the United States to any part of his lands, as a condition to the recognition by the United States of the validity of his title to the full extent acquired by him from the foreign government. * * *

"The purpose of the act is very plain and the scope and effect of the decree in a case where confirmation by the court is voluntarily sought, is easily distinguished from a case where the claimant is involuntarily brought before the court, in order that the United States may have it determined by the court whether he has any title or not.

"A decree of confirmation being final and conclusive as to the validity of the title, so far as the interest of the United States is concerned, would avoid the necessity thereafter of having to assert and defend such title upon the documents under which it was issued and it was therefore a valuable right. The act did not require a claimant who had a complete title to go before the court to test its validity, but permitted him to do so upon the condition that 'such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States,' and by the 14th section of the act it was provided:

" 'That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment, in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands, and such judgment, when found, shall be a charge on the Treasury of the United States.'

"In such cases lands lying within the limits of the grant that had been disposed of by the United States were expressly excepted from confirmation to the patentees, not by virtue of any title possessed by the United States but solely by consent of the grant claimants. Having invoked the aid of the court for confirmation, they were bound by all the conditions

of the act, and having accepted its benefits they also accepted the conditions imposed. Juan de la Cruz Trujillo, 28 L. D., 544."

"How then can the title to such lands as the United States may have sold be confirmed in any case where the claimant did not voluntarily come into court, if he was not bound to invoke the aid of the court to test the validity of his title. It may be urged that the United States had the right to bring him before the court without his consent, but that was to determine whether he had any title as against the United States, and if so, what was the extent of the title he acquired. It was not intended as a means of enforcing an arbitrary right to confiscate the claim or any portion thereof against the consent of the claimant.

"If the United States never acquired any title to this land by the treaty of cession and the absolute fee at that time was in the grant claimant as determined by the court, and if after the passage of the act of March 3, 1891, it was not obligatory upon such claimant to go before the tribunal created by that act to have his title recognized and its validity determined, and such title could be asserted before the ordinary courts of justice, it is utterly inconsistent to hold that such rights could be invaded or impaired by being brought into court involuntarily upon the petition of the United States.

"Besides a statute prescribing a mode by which a party may be divested of his property for the benefit of another without his consent is in derogation of common right and must be strictly construed. Noth ing can be taken by intendment, it must clearly appear from the statute."

Appellant's counsel in his brief admits that the argument of the Secretary "sounds well, and unquestionably it is reasonable, and, perhaps, in a certain sense, just" (Appellant's brief, p. 21). This argument of the Secretary is the same as that of the court from which this case is appealed, and it is accepted by the Supreme Court of Arizona as convincing (Transcript, p. 37, fol. 94). Appellant's counsel treats these views of the Secretary with considerable deference and re-

spect, a treatment entirely inconsistent with his treatment of the like decision of the Supreme Court of Arizona. The fact is that the decision of the court below and the argument of the Secretary of the Interior not only sound well and reasonable, but they are unquestionably reasonable and in every sense just. Moreover, the construction placed upon section 14 of the act of March 3, 1891, by the Supreme Court of Arizona and the Secretary of the Interior leaves the United States in the position of honestly carrying out its treaty obligations, whereas the construction for which appellant contends, if accepted, would involve a direct violation of the treaty obligations and the law of nations.

Attention is also called to the decree of confirmation by the Court of Private Land Claims. That decree finds as a matter of fact and of law that Ainsa did not appear voluntarily before that court; that his grant is perfect, and confirmation thereof is made without excluding any of the lands claimed by Richardson or others under the homestead patents. No appeal was taken by Richardson or others from this decree. It is final and conclusive upon them, and they ought not to be heard in another case and in another court to question it or litigate the same matters again.

Appellant cites in his brief in support of his contention the three following cases, to wit, United States *vs.* Conway, 175 U. S., 60; Real de Dolores *vs.* United States, 175 U. S., 75, and United States *vs.* Martinez, 184 U. S., 441.

Each of these cases was a direct appeal from the judgment of the Court of Private Land Claims. In two of the cases the decree of the Court of Private Land Claims was reversed. Had no appeal been taken in these two cases the decree of the Court of Private Land Claims, although erroneous, would have been final and binding upon the parties.

In the case at bar the Court of Private Land Claims refused to exclude the land previously patented to Richardson's grantors and others, under the homestead law, from its

decree confirming the San José de Sonoita grant. No appeal was taken from this decree by Richardson or the others. It is binding upon them, and is not now subject to collateral attack.

However, in none of these three cases was the question involved that arises in the present case. In United States *vs.* Conway the owner of a land grant petitioned the Court of Private Land Claims for its confirmation. A portion of the lands had previously been confirmed to certain Indian pueblos by the act of Congress of December 22, 1858. This court held that under the following provision of section 13 of the act creating the Court of Private Land Claims, to wit: "That no claim shall be allowed for any land the right to which has hitherto been lawfully acted upon or decided by Congress or under its authority," the lands previously confirmed to the Indian pueblos by an act of Congress should be excluded from the decree confirming the grant described in the petition.

In Real de Dolores *vs.* United States the same question substantially was involved as in the Conway case.

In the case of United States *vs.* Martinez the owners of a land grant had filed their petition with the Court of Private Land Claims for its confirmation. That court rendered its decree confirming the grant. After an unexplained delay of six years the grant claimants filed a supplemental petition seeking judgment for certain parcels of land within the limits of the grant, disposed of and patented by the United States to third parties before the filing of the original petition. This court held that the unexplained delay justified the court in holding that petitioners had abandoned their claim for a pecuniary judgment.

Nor is the case of Botiller *vs.* Dominguez, 130 U. S., 238, cited by appellant, at all in point. The question in that case was whether or not the following provision of the act of Congress of March 3, 1851, creating commissioners to pass upon land grants in California, to wit:

"And all lands the claim to which have not been
" presented to said commissioners within two years
" after the date of this act shall be deemed, held and
" considered as part of the public domain of the
" United States,"

applied to perfect grants. And this court held that it did.

The appellant lays great stress on this Botiller case, but it does not touch upon the point here raised. Congress might have adopted laws compelling owners of perfected claims in Arizona (New Mexico) to have them confirmed by a commission similar to the one created for California, and whose powers were under review in this last-cited case, but Congress did not adopt any such laws, and therefore the case is not in point. The act of March 3, 1891, is entirely different from that of March 3, 1851, and what the court said regarding the latter has no force in now construing the former.

None of the cases cited by appellant sustain his position.

In the case at bar the Court of Private Land Claims held that Ainsa did not voluntarily submit himself to the jurisdiction of that court, and confirmed his title to all the lands within the boundaries of his land grant as set forth in the decree. It refused to exclude therefrom the lands embraced within the homestead patents of appellant and others. No appeal was taken from this decree, and it is final.

The Secretary of the Interior, when the question was before him of whether or not there should be excepted from the patent proposed to be issued under this decree the lands previously disposed of and patented to appellant and others, held that such patented lands could not be excluded (Ely's Adm. *vs.* MacKee *et al.*, 34 L. D., 506-517).

So the only question now is whether or not, notwithstanding the decree of the Court of Private Land Claims and the decision of the Secretary of the Interior, the lands patented to Richardson's grantors are excluded from the Rancho San José de Sonoita by virtue of the specific provisions of the act creating the Court of Private Land Claims.

And we submit that these lands are not excluded by virtue of any of the provisions of that act.

We therefore respectfully submit that appellant's assignment of error, to the effect that the lower court had no jurisdiction of this case, is without merit for two reasons: (1) Because the United States Supreme Court has already so decided on the second appeal in this case; (2) because the lower court *did* have jurisdiction when plaintiff filed his amended complaint, and defendant, Richardson, answered thereto to the merits, and by not raising the question of jurisdiction in the court below he has waived his right to do so.

We further submit that appellant's second and third assignments of error are without merit, for the reason that the homestead patents, under which appellant claims title, are void for two reasons: (1) Because the United States never owned the land and could not convey it; (2) because the lands were reserved from sale or other disposition by an act of Congress—they were not "public lands"—and the officers who issued the patents acted without right and in violation of law. And the act creating the Court of Private Land Claims did not validate these patents or exclude the lands described therein from the Sonoita grant, as confirmed by that court.

It being conceded in the record that Ainsa, administrator, is the owner in fee of the grant as confirmed, and the patents under which appellant claims title being void, we submit the judgment of the lower court quieting the said title of Ainsa as against appellant was correct, and that that judgment should be affirmed.

Respectfully submitted.

FRANK H. HEREFORD,
Attorney for Appellee.

JOSEPH LEWIS AND
SELIM M. FRANKLIN,
Of Counsel.

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RICHARDSON *v.* AINSA, ADMINISTRATOR OF ELY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 28. Argued November 2, 1910.—Decided November 14, 1910.

Notwithstanding the contention of appellant in this case, the decision of this court in *Ainsa* v. *New Mexico & Arizona R. R. Co.*, No. 2, 175 U. S. 91, that the District Court of Arizona had jurisdiction of an action to quiet title brought by a grantee of the Mexican Government of land in the territory included in the Gadsden Purchase, did not proceed upon a mistake in fact and is not inconsistent with the reasoning of the decision of *Ainsa* v. *New Mexico & Arizona R. R. Co.*, No. 1, 175 U. S. 76.

Under the Gadsden Purchase Treaty with Mexico of December 30, 1853, 10 Stat. 1031, the good faith of the United States was pledged to respect Mexican titles, and one whose title was absolutely perfected prior to the treaty was not bound to present his title for confirmation to the Court of Private Land Claims under the act of March 3, 1891; nor did the fact that he prayed for confirmation, in a suit brought by the United States against him in that court to declare the patent void or to determine boundaries if valid, limit his claim to the recovery of the price specified in the act for land included within the grant but patented to others by the United States.

While under § 14 of the act of March 3, 1891, where the claimant of a Mexican land grant himself presented his claim to a Mexican grant in the Gadsden Purchase to the Court of Private Land Claims he might be limited to recovery in the case of lands within his grant sold by the United States to the price specified in the act, where he is brought into the court by the United States in a suit attempting to set aside a grant, title to which was perfected before the treaty, he is not so limited and patents issued by the United States to lands within the boundaries of his grant are mere usurpations and void.

95 Pac. Rep. 103, affirmed.

THE facts, which involve the title to land in Arizona,

in the territory known as the Gadsden Purchase, are stated in the opinion.

Mr. S. L. Kingan for appellant, submitted:

Although this court had already once decided in this case (*Ainsa* v. *New Mexico Ry.*, 175 U. S. 91) that the District Court of Arizona did have jurisdiction, yet, from the face of the decision it is apparent that the grounds supporting the decision are diametrically opposed to the conclusion arrived at, so that it is patent from the decision itself that it should have been to the contrary.

The acts of July 22, 1854, 10 Stat. 308, and July 15, 1870, 16 Stat. 304, remained in active force and effect until the act of March 3, 1891, creating the Court of Private Land Claims.

Between July 22, 1854, and March 3, 1891, during which time this suit was instituted, the only tribunals, therefore, that had jurisdiction to try title to land grants was the surveyor general of New Mexico and Arizona and the Congress of the United States. *Ainsa* v. *United States*, 175 U. S. 91, and see *Astiazaran* v. *Santa Rita Co.*, 148 U. S. 80.

It is immaterial how this court came to make its said error, whether through stipulations of the parties or otherwise, as jurisdiction cannot be stipulated, and it is always subject to be questioned by a litigant.

The previous decision as to jurisdiction should be changed to the conclusion derived from the grounds cited in support of the correct decision.

The lands in suit were public lands of the United States. While the United States was bound to respect the titles of Mexican grantees, all the land ceded belonged to the United States except the interests of Mexican grant claimants, and a statute was passed giving these grant claimants a right and an opportunity to establish their

claims of record. Until this was availed of by the grantee the land was at least *prima facie* public land. No notice having been given for twenty-five years, the United States was fully able to give such title and patent to the land as would bar the Mexican grant claimants from denying that the lands were public lands.

Under the Gadsden Purchase Treaty grantees from Mexico, of land embraced in the ceded district, are entitled to be protected in their property rights, the same as natural-born Americans. This would probably be so even if nothing were provided in the treaty. But that matter is definitely settled in the context. There is nothing in the statute requiring grantees to prove claims that violate the obligations of the United States under the treaty.

There is no confiscation nor deprivation without due process of law. The statute says that under certain circumstances, when land is patented to others, the grantee from Mexico shall take money in lieu of such land. The Congress of the United States decided that money would be a just compensation, and we have no higher authority. Therefore the grant claimant must have delayed so long as to give one a *prima facie* right to a patent. Even though the statute be in violation of treaty rights, there is no other recourse for the judiciary department than upholding the law. The violation of a treaty is not grounds for the court to act upon. The judiciary department must follow the law promulgated by the legislative department. If the legislators choose to violate a treaty, the affair is of a political aspect, and not a matter for the court's jurisdiction. *Botiller* v. *Dominguez*, 130 U. S. 238; *Edye* v. *Robertson*, 112 U. S. 580; *In re Ah Lung*, 18 Fed. Rep. 28; *Horner* v. *United States*, 143 U. S. 570.

The statute, however, does not violate, but is in furtherance of, the treaty. *United States* v. *Martinez*, 184 U. S. 441.

Even if the Mexican grantee is brought before the

court against his wishes, he is bound by the statute requiring him to accept money in lieu of patented lands within the boundaries of his grant. The United States has power to bring a party into court and have him bound by the decision. The Arizona decision, following the decision of the case in 34 L. D. 612, erred in saying that the defendant was not bound because he had not voluntarily submitted to the court.

All the principles of equity—laches, unjust enrichment, estoppel, fraud, etc.—unite in overthrowing any claim to this Mexican grant. Besides these equitable principles there are both the spirit and express wording of the statute directly in point, the interpretation of which cannot possibly be distorted to cover imaginary exceptions. See *United States* v. *Conway*, 175 U. S. 60; *Real de Dolores* v. *United States*, 175 U. S. 75; *Ainsa, Admr.*, v. *Magee*, 34 L. D. 506; *Botiller* v. *Dominguez*, 130 U. S. 238; *United States* v. *Martinez*, 184 U. S. 441; *United States* v. *Baca*, 184 U. S. 653.

The Court of Private Land Claims had no right to determine that the grant was a perfect one at the time of the treaty, but its only authority was to pass upon its jurisdiction, and to find that it had no jurisdiction.

The statute provides a means whereby the claimants' rights could have been established and recognized and proved for the benefit of all concerned. The statute provides for an adequate means of protecting one's rights in land and for preventing anyone being injured by unknown claims. *Doolan* v. *Carr*, 125 U. S. 618; *Newhall* v. *Sanger*, 92 U. S. 761, cited by appellee, do not sustain his position, nor do *Cameron* v. *United States*, 148 U. S. 301; *Reynegan* v. *Bolton*, 95 U. S. 33.

Appellee's sole authority for the decision of the Arizona Supreme Court is that of the Secretary of the Interior, 34 L. D. 506, which is offset, however, by *Botiller* v. *Dominguez*, 130 U. S. 238.

Mr. Joseph W. Lewis, with whom *Mr. Frank H. Hereford* and *Mr. Selim M. Franklin* were on the brief, for appellee:

This court having heretofore decided on appeal in this case, *Ainsa* v. *New Mex. & Ariz. R. R. Co.*, 175 U. S. 76, that the District Court had jurisdiction of this action, that question is settled and cannot be raised again. *United States* v. *Camou*, 184 U. S. 572, 574; *Hunt* v. *Ill. Cent. Ry. Co.*, 184 U. S. 77, 99; *Sibbald* v. *United States*, 12 Pet. 488, 492; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 471; *Snyder* v. *Pima County*, 6 Arizona, 41, 47; *Beiseker* v. *Moore*, 98 C. C. A. 372; *Washington Bridge Co.* v. *Stewart*, 3 How. 413; *Whyte* v. *Gibbs*, 20 How. 541.

The grant, being a complete and perfect grant prior to the treaty of cession, the grantee thereof, his heirs and assigns, had title in fee, which was not in any way affected by the change of sovereignty. *United States* v. *Percheman*, 7 Pet. 86, 87; *Ainsa* v. *New Mex. & Ariz. R. R. Co.*, 175 U. S. 76, 91; *Dent* v. *Emmeger*, 14 Wall. 308, 314; *Trenier* v. *Stewart*, 101 U. S. 797, 810.

The treaty of cession, commonly called the Gadsden Treaty, so provides. *Ely* v. *United States*, 171 U. S. 220, 241.

The lands embraced within the grant being private property the patents issued to parts thereof under the United States public land laws were utterly void. *Knight* v. *United Land Assn.*, 142 U. S. 161, 216; *Polk* v. *Wendell*, 9 Cranch, 87, 102.

The President of the United States has no right to issue patents for land the sale of which is not authorized by law. *Easton* v. *Salisbury*, 21 How. 426, 432.

Under the acts of July 22, 1854, 10 Stat. 308, and July 15, 1870, 16 Stat. 304, the lands within the limits of the said grant were reserved from sale or other disposal by the Government. 34 L. D. 506, 517.

While so reserved the homestead patents under which Richardson claims title were issued. Patents for lands reserved from sale are void. *Burfenning* v. *Chicago R. R. Co.*, 163 U. S. 321, 325; *Morton* v. *Nebraska*, 21 Wall. 660, 675; *Polk* v. *Wendell*, 9 Cranch, 87, 102; *Minter* v. *Crommelin*, 18 How. 87, 89; *Doolan* v. *Carr*, 125 U. S. 618, 642; *Noble* v. *Union River R. R. Co.*, 147 U. S. 165, 176.

Lands within the limits of a claimed Mexican grant in Arizona, being reserved from sale or disposal by the acts of Congress aforesaid, are not "public lands" of the United States, and are not subject to sale under the public land acts. *Cameron* v. *United States*, 148 U. S. 301, 311; *Reynegan* v. *Bolton*, 95 U. S. 33, 37; *Newell* v. *Sanger*, 92 U. S. 761, 766.

Under the cited acts of Congress the reservation became immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession. Op. Sec. of Int., 30 L. D. 97, 105.

The act of Congress creating the Court of Private Land Claims does not deprive the owner of a perfect grant, if he is brought into that court as a party defendant at the suit of the Government, of lands which previously had been unlawfully and without right patented to others, under the public land laws, and such lands are not excluded by the terms of that act from the grant as confirmed by that court. *Ely's Admr.* v. *Magee*, 34 L. D. 506, 517; *Richardson* v. *Ainsa*, 95 Pac. Rep. (Ariz.) 103, 105.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to quiet title brought in 1887 by the appellee's intestate in the District Court of Arizona. The decision was in favor of the appellee, and this decision was affirmed by the Supreme Court of the Territory,

whereupon the defendant Richardson appealed to this court.

The appellee represents a title derived from a grant by the Mexican Government of land in the portion of Arizona afterwards acquired by the Gadsden Purchase, December 30, 1853. 10 Stat. 1031. At the time of the Gadsden Purchase this title was complete. The appellant claims through mesne conveyances from holders of patents issued by the United States in 1879 and 1880 under the homestead laws.

The first error assigned is that the District Court was without jurisdiction. That point already has been decided against the appellant in this very case under the name of *Ainsa* v. *New Mexico & Arizona R. R. Co.*, No. 2, 175 U. S. 91, so that it is not open to him to urge it. *United States* v. *Camou*, 184 U. S. 572, 574. But it is proper to say that in our opinion the decision did not proceed upon a mistake of fact and is not inconsistent with the reasoning of the immediately preceding decision between the same parties, 175 U. S. 76, 86, although No. 2 was begun before and No. 1 after the passage of the act of March 3, 1891, c. 539, 26 Stat. 854, establishing a Court of Private Land-Claims.

In 1892 the United States brought a suit against the present appellee in the Court of Private Land Claims, alleging that his claim was void, and that the United States had granted patents for portions of the land, praying that the title might be adjudicated, and, if valid, the boundaries established, excepting such parts as might have been disposed of by the United States. The appellee answered setting up title, and praying confirmation. Ultimately in pursuance of the decision of this court, *Ely's Administrator* v. *United States*, 171 U. S. 220, a decree was entered in his favor and a patent issued to him on October 29, 1906, specifying no exceptions other than one of "gold, silver, or quicksilver mines or minerals of the same."

The appellant however contends that by virtue of the above-mentioned statute of March 3, 1891, the effect of the appellee's appearance in the Court of Private Land Claims was to forfeit all portions of the land in controversy that had been patented by the United States, and to give the appellee in place of it a claim for not exceeding $1.25 per acre so patented against the United States. The contrary decision is the other error assigned.

Of course, the patents for homesteads issued in the name of the United States, on the facts that we have stated, were a mere usurpation and were void. The lands covered by them, whether reserved or not by the acts of July 22, 1854, c. 103, § 8, 10 Stat. 308; July 15, 1870, c. 292, 16 Stat. 304, were not public lands, but private property, which the Government was bound by the express terms of the Gadsden Treaty of December 30, 1853, to respect. The appellant's claim rests solely on an interpretation of §§ 8 and 14 of the above-mentioned act of 1891, that would cut down the performance of the treaty promise by the United States to at least to the narrowest limits consistent with good faith. We are of opinion that the different construction adopted by the court below, and also by the Acting Secretary of the Interior in *Ely* v. *Magee*, 34 L. D. 506, 512, is correct. After providing in § 6 for incomplete titles the act goes on in § 8 to deal with complete ones. Holders of claims under such titles, it says, "shall have the right (but shall not be bound) to apply to said court" for a confirmation of their title. Of course, this means that the title is recognized as good without the proceeding in court. *Ainsa* v. *New Mexico & Arizona R. R. Co.*, 175 U. S. 76, 90.

The confirmation is granted, "excepting any part of such land that shall have been disposed of by the United States," and without prejudice to conflicting private interests. Then, in § 14 it is enacted that "if in any case it

shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree," with a provision for a judgment in favor of the claimant against the United States for the proved value of such granted lands, not exceeding $1.25 per acre. If this were all there could be no question that the exception of lands granted by the United States was merely a condition attached to the decree of confirmation, and did not purport to affirm such grants if the claimant did not see fit to go into the Court of Private Land Claims.

But in § 8 there is a further provision by which the United States may proceed against the claimant, as it did against the appellee, on the ground that the title or boundaries are open to question, and therefore the court is to determine the matter, "but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the provisions of this section applicable thereto." The appellant argues that this provision gives a wider meaning to § 14. He says that the words "if in any case" it shall appear that lands have been sold by the United States apply as well to a proceeding by the United States as to one where the claimant goes forward. He argues that so to apply them is just, in view of the supposedly unknown boundaries of the old Mexican grants and the policy of the United States in offering its public lands to settlers—that otherwise there is a suspended threat and possibility of a claimant turning up after many years and dispossessing those who had been encouraged by the United States to go upon the land. *Botiller* v. *Dominguez*, 130 U. S. 238. But the considerations mentioned in the case cited did not prevent the United States in the act of March 3, 1891, from leaving

the holders of perfected titles free not to present them to the court as they were required to do in earlier statutes. The good faith of the United States was pledged to respect the Mexican titles. It recognized in the act of 1891 that holders of such titles need not go into the Land Claims Court to get them confirmed, and we should be slow to suppose that it meant to make a doubt in the Department of Justice as to the validity of a perfect title a ground for cutting down what otherwise it was bound to protect and did by the statute leave intact. But for that unfounded doubt the appellee would have been secure in his rights, and could have turned the holders of the homestead patents off his land. *United States* v. *Martinez*, 184 U. S. 441, 445. The proceeding by the Government was a matter over which he had no control, and ought not to affect his rights. Looking at the words of § 14 more exactly they do not require the appellant's construction. "If in any case" means in any case before the court that the act established. And when the section goes on, "it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold," it is reasonable to suppose that it has reference to those cases in which a claimant is seeking a decree, that is to say, where the claimant is the plaintiff in the case. It is true that a petition by the United States may end in the same result, but the terms of the sentence and the duty of the Government concur in leading us to limit the words as we do. On the other hand, the consideration mentioned sufficiently shows that the claimant did not impair his position by praying for confirmation in his answer. The prayer merely expressed what would have happened without it by the force of law.

Judgment affirmed.